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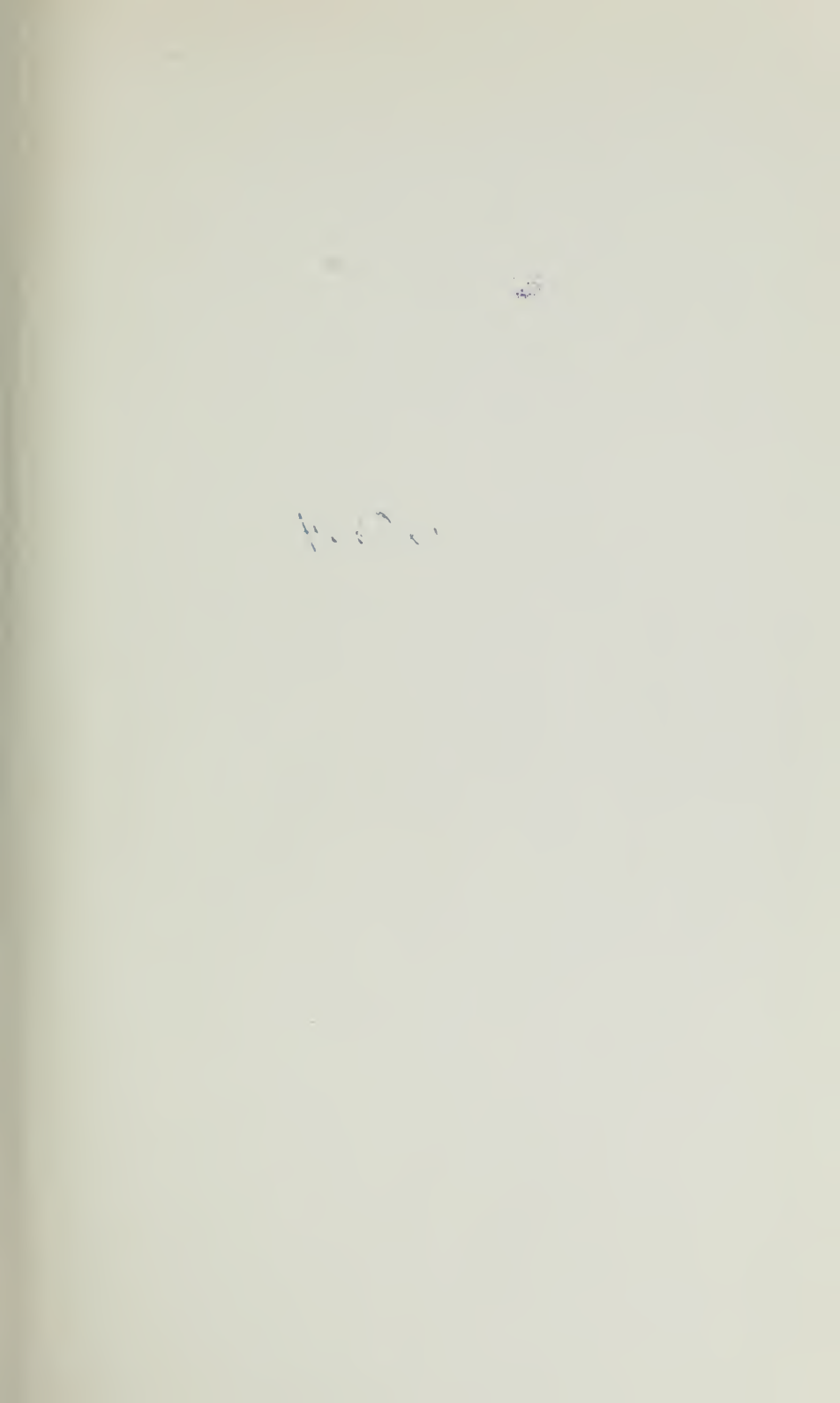
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N. 2893

No. 14392

United States
Court of Appeals
for the Ninth Circuit

CATHERINE O'CONNOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

FEB 15 1955


PAUL F. O'BRIEN,
CLERK

United States
Court of Appeals
for the Ninth Circuit

CATHERINE O'CONNOR, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—1-20-55



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Chief Counsel,

H. BRIAN HOLLAND,

Assistant Attorney General,

B. H. NEBLETT,

Division Counsel,

T. M. MATHER,

LEONARD ALLEN MARCUSSEN,

Special Attorneys,
Bureau of Internal Revenue.

The Tax Court of the United States

No. 24206

CATHERINE O'CONNOR, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

Now comes your Petitioner Catherine O'Connor
and by her Petition shows:

I.

That the Commissioner of Internal Revenue, respondent above-named, sent a registered letter to your petitioner, Catherine O'Connor, on May 13, 1949 determining and assessing her income tax liability deficiency of \$33,148.16 for the taxable years ending December 31, 1942, 1943 and 1944. That attached thereto was a Treasury Department Form 1276 stating in substance that your petitioner could initiate a proceedings before the Tax Court of the United States within 90 days thereafter.

II.

That the said determination and assessment of income tax liability and determination of deficiency in said registered letter was the said \$33,148.16 sum for the said taxable years of 1942, 1943 and 1944. That your petitioner duly and timely filed her income tax returns for each of said years 1942,

1943 and 1944 on or before the 15th day of March following the close of each taxable year aforesaid, with the Collector of Internal Revenue of the First District of California at San Francisco, California.

III.

That a copy of the said Commissioner's registered letter of May 13, 1949 together with the statement attached thereto is set forth *hoc verba* in Exhibit A of this petition, and is incorporated herein, made a part hereof to the same extent, to the same effect, and as if herein set forth at length.

IV.

That said respondent Commissioner erred in the said determination of said deficiency, in the following:

1. That the assessment for the taxable year 1942 was not timely and barred by reason of Internal Revenue Code Sec. 275 (a), more than 3 years having elapsed from 15 March 1943 to 13 May 1949.

2. That the assessment for the taxable year 1942 was not timely and barred by reason of Internal Revenue Code Sec. 275 (c), more than 5 years having elapsed from 15 March 1943 to 13 May 1949.

3. That the assessment for the taxable year 1943 was not timely and barred by reason of Internal Revenue Code Sec. 275 (a), more than 3 years having elapsed from 15 March 1944 to 13 May 1949.

4. That the assessment for the taxable year 1943 was not timely and barred by reason of Internal Revenue Code Sec. 275, (c), more than 5 years having elapsed from 15 March 1944 to 13 May 1949.

5. That the assessment for the taxable year 1944 was not timely and barred by reason of Internal Revenue Code Sec. 275, (a), more than 3 years having elapsed from 15 March 1945 to 13 May 1949.

6. That there is no factual basis for any assessment or penalty under Internal Revenue Code Sec. 293B for any of said taxable years, and there was no fraud or intent to evade any tax, in any sum, or at all in any of said years, or any other time.

7. That the attached statement for the year 1942 is erroneous in determining \$6320.77 or any other sum in excess of \$172.13 as Business net income.

8. That the attached statement for the year 1942 is erroneous in determining \$303.00 or any other sum as rental income.

9. That the attached statement for the year 1942 is erroneous in determining \$22.44 or any other sum as addition interest income.

10. That the said assessment is erroneous in that it does not give your petitioner credit for losses in the Divers-Jost partnership from theft of money and merchandise of the partnership.

11. That the computations of tax for the year 1942 computes income of her husband William Jost in the first three months of 1942, before the mar-

riage of Jost to petitioner, as income of your petitioner for the purpose of income tax assessment.

12. That the computation of tax for the year 1942 computes income of the husband, community property income taxable to said husband, to your petitioner's income for purpose of tax against her.

13. That any tax for personal income for the taxable year 1942 was forgiven by the Current Tax Payment Act of 1943.

14. That the attached statement for the year 1943 is erroneous in determining there was unreported income in the sum of \$17,030.71 or any other sum, or the net income was increased "per audit of record" in sum of \$791.28 or any other sum, or that there was Rental Income in the sum of \$324.66, or any other sum, or interest omitted in the sum of \$20.67 or any other sum.

15. That the computation for the year 1943 is erroneous in that it purports to omit the community property law of California and charge all community property to one spouse, your petitioner.

16. That the computation of the tax is erroneous in that it assumes that the husband of petitioner, William Jost, did not report and pay the tax apportioned to him.

17. That the computation of the tax is erroneous in that it assumes that the status of husband and wife did not exist between the parties, your petitioner and William Jost during the entire period of the calendar year 1943.

18. That the statement of 1943 tax does not give

your petitioner credit for Other Income (including rental) as a loss of \$28.60.

19. That the statement of 1943 tax does not give your petitioner credit for deductions of \$410.00.

20. That the statement of 1944 attached to said letter as a basis for said assessment is erroneous in determining there was unreported net income of \$22,596.49, or any other sum, or that there was income from rent understated in the sum of \$519.00 or any other sum, or that there was any overstatement of repairs in the sum of \$218.03 or any other sum, or any increase of $\frac{1}{5}$ or any other fraction of \$510.23 or any other sum for repairs, etc., or any decrease in costs of \$3,936.32 or any other sum, or any decrease in contributions of \$481.00 or any other sum.

21. That the Commissioner did not set forth any Schedules A, B or C on page 3 of said attached computations, and for want of the matter therein cannot do other than deny each and every matter adverse to your petitioner, and specify any such claimed adjustment or disallowed deduction as erroneous.

22. That the Commissioner did not apply the law of community property to the petitioner for her marriage to Jost and that was dissolved on July, 1944 by a decree of divorce, but charged your petitioner with all income therefrom.

23. That the Commissioner erred in not giving your petitioner credit for the loss of \$1,295.74 for Other Income (rentals).

24. That the Commissioner erred in not depre-

ciating the investment in fixtures and lease, amounting to \$2500.00 in her tavern business, over the unexpired portion of the lease which was terminated by expiration of its term in early 1945, from the time of acquisition of petitioner in July, 1942, from the partnership that held the same.

V.

That there was no fraud or intent to evade any personal income tax in any of said years. That your petitioner was not skilled in income tax accounting nor law and knew she was not skilled and that 1942 was the first accounting period she did not rely upon a partner to take care of the accounting of her business; and in consequence employed a public accountant of 30 years practice and licensed to practice before the Treasury in tax matters to make out her income tax returns. That in each of the years 1942, 1943 and 1944 your petitioner relied in good faith on said accountant, provided him with all information, records, and made a full and complete disclosure of all matters of her financial matters upon which he made inquiry or requested information; that your petitioner relied upon the returns prepared and filed.

VI.

1. That your petitioner did not receive business net income from her tavern business during the calendar year 1942 in excess of the sum of \$172.13.

2. That your petitioner suffered substantial losses from theft during the Divers-Jost partnership, which the Commissioner well knew but did

not credit to nor take into account in the said determination.

3. That your petitioner was married to William Jost in March 1942 who worked with and put his earnings from his salary in 1942 into the business, and took his personal expenses from the business until the separation in July 1943.

4. That the status of husband and wife and the community were not terminated or dissolved until July 1944.

5. That both were domiciled in and residents of California during said period and the law of community property was applicable to all property and earnings as between your petitioner and her husband by that marriage.

6. That Special Agent Krause of the Bureau of Internal Revenue made an audit of and determined for the Commissioner on such audit that "Other Income" including rents amounted to a loss of \$28.60 during the calendar year 1943 and a loss of \$1295.74 during the calendar year 1944.

7. That your petitioner acquired a one half partnership interest in the tavern business for \$1000 and the entire balance of the partnership assets and interest for an additional \$1500 in July 1942. That the assets consisted of principally fixtures and a lease which expired by its terms in early 1945 at which time the fixtures became valueless as did the lease and your petitioner had to buy land and move to another location.

8. That your petitioner's net income is substantially that upon which tax has been duly paid, and

any error or omissions of her accountant in gross income not reported have been and are counter-balanced by approximately the same amounts by errors and omissions of proper deductions and business expenses not reported by her said accountant in the said returns.

Wherefore your petitioner prays:

1. That the Tax Court redetermine the tax for each of the years 1942, 1943 and 1944.

2. That the Tax Court hold that the remedy and time for assessment was not timely in each of the years 1942, 1943 and 1944 and each barred by Sec. 275.

3. That the Tax Court annul any and all assessments of penalty for fraud or under Sec. 293(b) for each of the years 1942, 1943 and/or 1944.

4. And for such other and further, or other or further relief, decrees, judgments and/or orders as shall be just and equitable in the premises.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioner

Duly Verified.

* * * * *

[Endorsed]: T.C.U.S. Filed July 19, 1949.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of In-

ternal Revenue, and for answer to the petition filed by the above-named petitioner admits, denies and alleges as follows:

I. Admits the allegations contained in paragraph I of the petition, except denies that there was any assessment of tax by reason of the notice of deficiency.

II. Admits the allegations contained in paragraph II of the petition, except that there was any assessment of tax by reason of the notice of deficiency and that petitioner's returns were duly and timely filed.

III. Admits the allegations contained in paragraph III of the petition.

IV. Denies that the Commissioner erred in the determination of the deficiency as alleged in subparagraphs (1) to (24), inclusive, of paragraph IV of the petition.

V. Denies the allegations contained in paragraph V of the petition.

VI. (1) and (2) Denies the allegations contained in subparagraphs (1) and (2) of paragraph VI of the petition.

VI. (3), (4), (5) For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs (3), (4) and (5) of paragraph VI of the petition.

VI. (6) Denies the allegations contained in subparagraph (6) of paragraph VI of the petition.

VI. (7) For lack of knowledge or information sufficient to form a belief, denies the allegations

contained in subparagraph (7) of paragraph VI of the petition.

VI. (8) Denies the allegations contained in subparagraph (8) of paragraph VI of the petition.

VII. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

VIII. Further answering petition herein, respondent alleges as follows:

(a) During each of the taxable years involved herein petitioner operated a bar on Valencia Street, San Francisco, California, and received income from said business and income in the form of rents on property owned by her and in the form of interest and from other sources.

(b) During each of the taxable years involved herein petitioner received taxable net income in excess of the amount of income reported by her on her returns for each of said years. With intent to evade the tax due thereon petitioner willfully and fraudulently understated her net income on each of said returns for each of said years by the aggregate amounts set forth in the following tabulation:

Year	Taxable Net Income	Victory Tax Net Income	Net Income Reported	Under- statement
1942	\$10,044.26	\$	\$ 777.29	\$ 9,266.97
1943	21,821.05	.....	7,879.28	13,941.77
1943	.....	22,569.55	8,289.28	14,280.27
1944	30,571.66	.....	5,091.98	25,479.68

(c) With intent to evade the tax due on her net income for each of the taxable years involved herein, petitioner willfully and fraudulently kept

false and incorrect books of account from which she caused her returns for each of said taxable years to be prepared, and wilfully and fraudulently failed to keep accurate books of account and records as required by law showing the true amount of the income received by her and the true amount and character of deductions allowable from said income under the Internal Revenue Code.

(d) With intent to evade the tax due on her net income for the taxable year 1942, petitioner willfully and fraudulently understated on her return for said year business income received from the operation of her bar in the amount of \$8,887.03, and willfully and fraudulently failed to report on said return rental income received by her during said year in the amount of \$303.00 and interest income in the amount of \$22.44.

(e) With intent to evade the tax due on her net income for the taxable year 1943, petitioner willfully and fraudulently understated on her return for said year business income received from the operation of her bar in the amount of \$17,821.99, and willfully and fraudulently failed to report on said return rental income received by her during said year in the amount of \$324.66 and interest income in the amount of \$20.67.

(f) With intent to evade the tax due on her net income for the taxable year 1944, petitioner willfully and fraudulently understated on her return for said year the business income received from the operation of her bar in the amount of \$22,-

596.49; willfully and fraudulently overstated in the computation of her income from said business the cost of goods sold in the amount of \$3,936.32 and her expense for repairs in the amount of \$218.03; willfully and fraudulently understated her rental income in the amount of \$519.00; willfully and fraudulently overstated in the total amount of \$510.23 her expense for depreciation, for repairs and for other items in computing the net rental income which she did report on her return for said year; and willfully and fraudulently failed to report interest income received by her during said year in the amount of \$39.13.

Wherefore, it is prayed that petitioner's appeal be denied; that the Court redetermine the taxes and penalties due from this petitioner for the years 1942 through 1944 in the amounts determined by the Commissioner in the notice of deficiency.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal
Revenue

Of Counsel: B. H. Neblett, Division Counsel; T. M. Mather, Leonard Allen Marcussen, Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed August 30, 1949.

[Title of Tax Court and Cause.]

REPLICATION

Now comes the Petitioner Catherine O'Connor and answering the allegations of the Respondent in the Answer filed in the above-entitled matter, avers:

1. Admits that from and after July 1942 she, and her husband William Jost, had income from a bar business on Valencia Street in San Francisco, and she had gross income from rentals of certain real property, but denies each and every, all and singular the allegations contained in paragraph VIII of said Answer not so admitted.

And For a Second and Separate Answer, Petitioner avers:

1. Answering Paragraph VIII (b) of said Answer:

Denies any willful or fraudulent understatement in any of said years. Denies taxable income of 1942 was \$10,044.26 or any other sum in excess of approximately \$777.29; denies any understatement in 1942 of \$9,266.97 or any other sum. Denies taxable income of 1943 was \$21,821.05 or any other sum in excess of approximately \$7,879.28; denies any understatement of \$13,941.77 or any other sum. Denies taxable income of 1944 was \$30,571.66 or any sum in excess of approximately \$5,091.98; denies any understatement of \$25,479.68 or any other sum. Denies the 1943 Victory Tax Net Income was \$22,569.55 or any sum in excess of approximately

\$8,289.28; denies any understatement in the sum of \$14,280.27, or at all.

(c) Answering Paragraph VIII (c), of said Answer:

Denies there was any intent to evade any tax in any of said years, or at all. Denies Petitioner willfully or fraudulently kept any false or incorrect books of account or any other improper records. Denies there was anything willful or fraudulent in the keeping of any books or records at any time, or at all, or any failure to keep proper books or records required by law or otherwise showing the true income or true amounts or character of deductions or otherwise.

(d) Answering Paragraph VIII (d), of said Answer:

Denies any intent to evade any tax for any of said years or for 1942, or at all. Denies any willful or fraudulent acts or intent. Denies any and all allegations of understatement. Denies the income of the bar business in 1942 was \$8,887.03 or any other sum in excess of approximately \$172.13. Denies any rental income in 1942 in excess of expenses in the sum of \$303 or any other sum; and alleges all income did not exceed in rentals, losses occasioned by fire and destruction of the tenants in said period, and other expenses. Denies any interest income of \$22.44 in excess of deductible expenses in "other income."

(e) Answering Paragraph VIII (e), of said Answer:

Denies any intent to evade any tax for the year 1943, or at all. Denies that Petitioner acted willfully or fraudulently or any other wrongful purpose or intent. Denies any evasion of any tax or at all. Denies that her income from the bar was \$17,821.99 or any other sum in excess of approximately \$7,879.28, or that her "other income" was in excess of a loss \$28.60 and in this respect denies that her rental income was \$324.66 or any other sum in excess of a loss, or that her interest income was \$20.67 or any sum in excess of a loss.

(f) Answering Paragraph VIII (f), of said Answer:

Denies any intent to evade any tax for net income or to avoid any tax or at all in the year 1944. Denies that any of Petitioner's acts were willful or fraudulent or done with any other improper purpose. Denies that her income from her bar was \$22,596.49 or any other sum in excess of approximately \$5,091.98, as reported. Denies that she acted willfully or fraudulently or in any other improper manner in reporting her income from her bar or costs of her goods, or expenses or repairs or her rental income or depreciation or her interest income or any other item. Denies that her "other income" was other than a loss of \$1,295.74, and in this respect denies that her income from rentals was \$519 or any other sum or her income from interest was \$39.13 or any other sum.

Wherefore, Your Petitioner Catherine O'Connor prays: that the Court redetermine the tax and penalties and interest for the years 1942 to 1944 inclusive; and Petitioner incorporates her prayer of her Petition herein.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Lodged December 5, 1949.
Filed December 7, 1949.

[Title of Tax Court and Cause.]

AMENDMENT TO ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and in accordance with leave granted by the Tax Court at the trial in this proceeding, amends his answer to the petition filed by the above-named petitioner by adding thereto the following allegations:

7. Further answering the petition herein, respondent alleges as follows:

(a) Petitioner omitted from gross income an amount which is in excess of 25 per centum of the gross income reported by her on her return for the year 1944.

(b) From January 1, 1942 to July 15, 1942, petitioner operated a tavern on Valencia Street, San Francisco, California, in partnership with one Victor Divers. The partnership filed a return for the year 1942 on which was claimed and allowed a deduction of \$525.00 for the annual liquor license fee for 1942.

(c) On July 15, 1942, petitioner bought out Victor Divers and became the sole owner of the tavern. In December, 1942, petitioner paid \$525.00 for renewal of the liquor license for the year 1943, and was erroneously allowed a deduction for said amount in the determination of deficiency and penalty for the year 1942, which is the subject of this litigation.

(d) There is accordingly due from this petitioner an additional deficiency in income tax and penalty for the taxable year 1942 in the amount of \$178.50 and \$89.25, respectively, over and above the deficiency in tax and penalty of \$2,226.05 and \$1,113.03 asserted by the Commissioner in his notice of deficiency for said year.

Wherefore, respondent prays that the Court re-determine the deficiencies in income tax and penalty herein for the year 1942 to be the amounts determined by the Commissioner, viz., \$2,226.05 and \$1,113.03, respectively, plus increased deficiencies in tax and penalty in the amounts of \$178.50 and \$89.25, respectively, claim for which is hereby made

pursuant to the provisions of Section 272(e) of the Internal Revenue Code.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal
Revenue

Of Counsel: B. H. Neblett, Division Counsel; T. M. Mather, Leonard Allen Marcussen, Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed November 24, 1950.

[Title of Tax Court and Cause.]

REPLICATION TO AMENDMENT TO COMMISSIONER'S ANSWER

Now comes the petitioner, Catherine O'Connor, and answering the Amendment to the Answer, avers:

I.

Denies each and every, all and singular the allegations of Paragraph 7, (a) of said Amendment.

II.

That leave was granted to file only Paragraph 7, (a) in the above entitled matter, relative to a statute of limitations and the request for leave to amend as to other matters was not granted.

III.

That your petitioner, Catherine O'Connor, re-

ported on a cash basis, and any payments actually made for business licenses and/or taxes in the year 1942 were properly reported on a cash basis. That the partnership return was not questioned by the Commissioner notwithstanding it was prepared by the accountant Bosserman and all the deductions properly allowable by law were not taken by said accountant in preparing returns for the taxpayer. That having accepted said return as proper the Commissioner is estopped to deny it is improper or deductions are already taken therein, and the reopening of said issues as to deductions and whether properly taken in the accounting period of 1942 by said partnership or petitioner, at the conclusion of taking of testimony in the above entitled matter, seriously prejudices your petitioner and the trial of this matter in the above entitled matter.

IV.

That your petitioner's returns were on a cash basis for the year 1942, and renewals of licenses were properly taken in the year 1942, when paid in said accounting year. That the Commissioner has not made any order or demand for the changing of your petitioner's accounting from a cash basis to any other basis for the accounting period of 1942 calendar year.

V.

That it is unfair and inequitable to disallow a cash disbursement in the year 1942 for liquor license for the year 1943, after the trial of the issues

and reception of all evidence, without reducing the liability for the subsequent year, by amendment.

VI.

That if the Commissioner erroneously allowed a deduction for liquor licenses for 1943 in its notice of intention to assess and computations for the year 1942, instead of 1943:

(a) The Commissioner's computations for 1942 and 1943 are admittedly wrong and no presumption of validity nor correctness attaches to the computations of the year 1942, nor for the year 1943, nor is a prima facie case made from said assessment or computations;

(b) The Commissioner's computations for the year 1942 and 1943 being admittedly wrong by allegations contained in the Commissioner's pleading entitled "Amendment to Answer", the burden of proof shifts to said Commissioner for each of said accounting periods.

Wherefore, your petitioner, Catherine O'Connor, prays that the Commissioner take nothing by reason of his amended pleading, and your petitioner adopts her prayer in her Petition, and for such other and further, or other or further relief, decrees, judgments and/or orders as shall be meet in the premises.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Filed December 21, 1950.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

Howard B. Crittenden, Jr., Esq., for the petitioner.

Leonard A. Marcussen, Esq., for the respondent.

Turner, Judge: The respondent determined deficiencies in income tax against the petitioner for the calendar years 1942, 1943 and 1944 in the respective amounts of \$2,226.05, \$6,837.81 and \$13,034.91, and 50 per cent additions to tax for such years in the amounts of \$1,113.03, \$3,418.91 and \$6,517.45, for fraud with intent to evade tax.

The questions for determination are (1) whether petitioner failed to report substantial amounts of income on her return for each of the taxable years; (2) whether rents assigned to pay expenses and principal payments on a mortgage on an apartment house which had been purchased by petitioner were taxable to her; (3) whether any part of the income herein was community income taxable only in part to petitioner; (4) whether the period within which respondent might assess and collect any deficiencies herein has expired under the provisions of section 275 of the Internal Revenue Code; and (5) whether any part of the deficiencies was due to fraud with intent to evade tax.

Findings of Fact

Some of the facts have been stipulated and are found as stipulated.

Petitioner is a resident of San Francisco, California. She filed her income tax returns for the years involved with the collector of internal revenue for the first district of California.

On January 1, 1942, and until July 15, 1942, petitioner and Victor Divers were equal partners in the business of operating a tavern and bar at 581 Valencia Street, in the Mission district, in San Francisco. She had acquired her one-half interest in the business in 1940, for \$1,000. She became sole owner of the business on July 15, 1942, when she purchased the interest of Divers for \$1,600, of which \$400 was from her savings and \$1,200 was money she had borrowed from the Morris Plan Company of California.

Petitioner had borrowed the \$1,200 from the Morris Plan Company on April 23, 1942, giving her note, secured by Thrift Account No. 19601, which account was carried in her former name of Catherine N. Larson. The balance in the account at that time was \$1,125.79. At December 31, 1942, she had reduced the balance due on the note to \$300, which amount she paid in a lump sum on February 2, 1943.

In the course of her operations, petitioner always had dice at the bar of her tavern, and many customers would shake "double or nothing" for their drinks. If they won, the drinks were free. If they lost, they paid double. Regardless of the turn of the dice, the advantage was with petitioner, since if she lost she was out only the cost of the ingredients of the drink, not the amount a customer would have

paid for the drink served. When petitioner was not present, her bartender would shake the dice with the customers. Petitioner would also roll the dice at the bar with customers for money. Play for money was largely restricted to the years 1943 and 1944. Little, if any, such play occurred in 1942.

In addition to the bar from which drinks were served, coin machines were available in the tavern for the diversion of the petitioner's customers. They consisted of a juke box or record playing machine, a pinball machine, and a claw machine. These machines did not belong to petitioner, but were placed there by the owners, under an arrangement whereby petitioner was entitled to fifty per cent¹ of the money played into the machines.

The partnership accounts had been kept in a book, referred to herein as the "gray" book. One column purported to show total receipts for each day and a second column the total expenditures or "pay outs" for the day. Other columns, which included among the headings Pur.; Miss.; Equipment; Rent; Adv.; Taxes; and Wages, purportedly carried a breakdown of the total expenditures or total "pay outs" for the day. In the keeping of that book, each partner had checked on the other. After her purchase of Divers' interest in the business on July 15, 1942, petitioner continued making entries in the "gray" book for July 16 through August 23, 1942. She made no entries in the "gray" book after

¹ As to petitioner's share of the money played into the juke box, there is some conflict of record as between forty per cent and fifty per cent.

the latter date, and after the thirtieth of July, there were no entries in the total expenditures or "pay outs" column, although there were entries in other columns showing details of some purported expenditures made during the period.

Sometime at or about the period mentioned, petitioner opened a new book, referred to herein as the "black" book. In this book she also made entries purportedly covering operations for the period July 16 to August 23, 1942. After the latter date, the "black" book was the only account book maintained by petitioner for the years involved herein. As shown by the entries in the "black" book, the receipts of the business for the period July 16 through August 23, 1942, averaged approximately \$17 less per day than the receipts shown for the same period in the "gray" book. In the "black" book, the first column purported to show total receipts for each day of operations as shown by the cash register. It did not show receipts from other sources. There was no column purporting to show total expenditures or total "pay outs" for each day. Entries indicating disbursements were made in columns under varied designations, among which were Liquor; Beer & Wine; Tobacco; Mixers; Food; Loans, Donations, Insurance; Personal; Policeman, Garbage and Garage; Light-Gas; Supplies; Rent; Wages; Taxes; Laundry, Bad Debts; Phone, Advertising. There were no entries showing the inventory of liquor or other stock on hand at the beginning or end of any taxable or accounting period.

During the years herein petitioner made entries

in the "black" book purporting to represent charitable contributions to the Red Cross, the U.S.O., the Salvation Army, the church and the poor. Most of these entries were false, in that the contributions indicated were not in fact made.

The juke box or music box was checked regularly each week by the owner. The checking of the claw and pinball machines was not so regularly done. The profits from the three machines and the winnings from the rolling of the dice at the bar for cash were not run through the cash register, but were put in petitioner's purse or a box kept at the counter. Losses from the rolling of dice for cash were paid from the purse or box, and not from the cash register. No record was kept in the "black" book or otherwise of the profits from the coin machines or of any winnings from gambling operations.

The Larson-Divers partnership had a checking account with the Mission Branch of The Bank of California from October 14, 1941, to July 16, 1942, when the account was closed and the balance therein of \$593.45 became the opening deposit in the checking account of petitioner. Petitioner's account was in the name of Catherine N. Larson, and was so continued throughout the years herein. From July 16, 1942, through December, 1944, petitioner made deposits in the account on an average of between seven and eight times a month. The deposits ranged from a low of \$13.60, on August 16, 1943, to a high of \$952.31, on December 26, 1944, the majority thereof ranging between \$100 and \$400. For

the year 1944, the deposits were made more frequently, on an average of nine times a month, and were, on the average, larger in amounts. These deposits were in part of money taken from the cash register through which all bar sales purportedly passed and in part from receipts of which no record was made.

From April 23, 1942, to August 22, 1942, petitioner also had a checking account with the American Trust Company. This account was opened on April 23, 1942, with a deposit of \$1,404, which included the \$1,200 petitioner had borrowed that day from the Morris Plan Company. The account was built up to \$2,197.40, at July 2, 1942. A check for \$1,550 cleared through the account on July 17, 1942, one day after petitioner had acquired Divers' interest in the tavern business. When the account was closed on August 22, 1942, the balance was \$58.12.

At the time petitioner's \$1,200 note to the Morris Plan Company was paid in full, on February 2, 1943, the balance in Thrift Account No. 19601, which had been pledged as security, was \$1,148.23. On April 15, 1943, \$750 was withdrawn for the purchase of a bond, leaving a balance of \$398.23 in the account. This amount was withdrawn on May 18 and applied with a check for \$351.77, drawn on the account at the Bank of California, to make \$750, for the purchase of a war bond. Account No. 19601 was reopened on June 22, 1943, with a payment into the account of \$2,600; \$1,465 was added on August 18, 1943; \$200 on August 25, 1943; \$1,000 on September 23, 1943; and \$228.95 on October 8, 1943.

On the latter date, October 8, 1943, \$4,750 was withdrawn, leaving a balance in the account of \$743.95. Payments into the account of \$725 on November 9, 1943, \$1,600 on September 28, 1944, and \$362.50 on October 25, 1944, plus credits for interest, brought the balance in the account at December 31, 1944, to \$3,467.01. Neither the "black" book nor any other record made or maintained by petitioner reflects the above payments into the thrift account or the source of the funds so paid in. Except for a withdrawal of \$38 on January 6, 1942, and the withdrawals heretofore described, no withdrawals were made from the account during 1942, 1943, or 1944. For the period herein, interest was credited to the account as follows:

To July 1, 1942: \$11.08.

To January 1, 1943: \$11.36.

To January 1, 1944: \$20.67.

To July 1, 1944: \$14.89.

To January 1, 1945: \$24.24.

The premises at 581 Valencia Street, in which petitioner's business was operated during the years herein, were leased premises. Above the bar were some rooms or apartments, which were also covered by the lease, the entrance thereto being at 579 Valencia Street. For a substantial part of the said years one of these apartments was occupied by petitioner. The others were rented to tenants. For the period from January 1 through July of 1942, the rent collected by the partnership on the said apartments was \$426. From August 1 until the end of the year, only one apartment was rented, on

which petitioner collected rent for August through December amounting to \$90. For 1943, she collected \$616 as rent on the apartments, and for 1944, \$1,228. None of the amounts so received as rent for the said apartments was entered or shown by the partnership or petitioner in either the "gray" book or the "black" book. To some extent, at least, expenses for water, lights and gas incurred in connection with the renting of the apartments were included among the disbursements listed by the partnership, and by petitioner in the said books. The same was true of that part of the rent paid under the lease which was allocable to the apartments.

On August 21 of 1943, petitioner contracted to buy an apartment house at 2710 Baker Street, in San Francisco, for \$17,000, of which \$7,000 was to be paid in cash. The remaining \$10,000 was covered by a deed of trust which had been placed on the property by Herbert Rosenbaum, its owner. Before leaving for duty overseas, Rosenbaum had engaged Maurice Hyman, who was petitioner's attorney, to represent him in all matters, including the sale of the apartment house. Under the arrangement, Hyman became the owner of a one-third interest in the property. Thereafter he negotiated the contract of sale with petitioner and, by its terms, was to collect the rents, pay the expenses and apply the balance to the payment of interest and principal until the \$10,000 covered under the deed of trust had been paid. In October, presumably on October 8, petitioner made a payment of \$7,000 in cash

under the contract and on or about October 15, title to the property was conveyed to her, subject to the outstanding trust. Petitioner had already paid \$500 in August, and upon conveyance of title was also given credit for \$101.55, being half of the October rents which had been collected from tenants. The \$7,500 in cash so paid, plus the \$101.55 of October rent, was applied first in satisfaction of the \$7,000 cash payment required under the contract, the title expenses and insurance and then to the \$10,000 due under the trust, leaving \$9,723.37 as the balance of the \$17,000 purchase price due and owing at October 15, 1943.

The \$500 payment made under the contract in August of 1943 was made by check on the Bank of California and was entered in the "black" book, under the column headed Personal. There was no check for or entry in the "black" book to show the cash payment of \$7,000 on October 8, or any other date. It does appear that \$4,750 was withdrawn on October 8, 1943, from Thrift Account No. 19601 with the Morris Plan Company.

For the months of November and December, 1943, the rent collected from tenants of the Baker Street apartments and applied by Hyman pursuant to the contract amounted to \$207.50 a month. For the year 1944, the rent collected was \$1,775. There were no entries in the "black" book or any other record kept by petitioner showing the amounts collected as rent on the said apartments.

In addition to the rents received by Hyman from tenants and applied on the balance due and owing

under the trust, petitioner made payments as follows:

November 2, 1943: \$1,500.47.

December 16, 1943: \$1,000.00.

January 1, 1944: \$1,000.00.

January 15, 1944: \$500.00.

January 26, 1944: \$750.00.

February 5, 1944: \$1,000.00.

March 24, 1944: \$1,500.00.

July 6, 1944: \$1,000.00.

July 20, 1944: \$798.40.

The trust was satisfied in full by petitioner's payment of \$798.40 on July 20, 1944, although Hyman apparently continued collecting the rents through October. After satisfaction of the trust, however, the balance of the rents remaining after payment of expenses was paid over to petitioner.

There is no record either in the "black" book or in the checking account of the above November 2, 1943 payment of \$1,500.47. Some substantial portion, if not all, of the said amount was paid in currency which was neither entered in the "black" book nor deposited in the bank. The above payments under dates of December 16, 1943, January 1, 1944, January 15, 1944, January 26, 1944, March 24, 1944, and July 20, 1944, were all made by check and were entered in the "black" book, in the column headed Personal. The July 6, 1944 payment of \$1,000 is shown in the "black" book in two \$500 payments; one of these \$500 payments was made by check.

On January 1, 1942, petitioner had no assets

other that her one-half interest in the tavern, an automobile on which a balance was still due, \$863.79 in Thrift Account No. 19601 with the Morris Plan Company, and her personal effects. At no time during the years herein did she receive any money or property by gift, devise, or bequest, except \$13 from the estate of a deceased uncle.

In March of 1942, petitioner married William B. Jost. They lived together until sometime in June of 1943. On June 22, 1943, petitioner filed suit for divorce, and on July 22, following, was granted an interlocutory decree. A final decree was entered on October 30, 1944. Except for a short period immediately following their marriage, they lived in one of the apartments over the tavern. At times after the suit for divorce was filed and prior to July 8, 1943, Jost insisted that petitioner allow him to sleep at the apartment and, against her wishes, he did at times sleep in the living room. After July 8, he at all times lived elsewhere.

At the time of petitioner's marriage to Jost, he was employed as a driver for Dacus Oil Company, and continued in that employment until August or September. During that period he would assist petitioner at the tavern in his spare time. After leaving the oil company, he was unemployed until June of 1943, when he went to work for Young's Patrol. In the interim, his only work was that of helping petitioner in the tavern. During that period, petitioner provided him with clothes, food, lodging and spending money. While living with petitioner, as above stated, Jost never received any of the profits

of the business, as such, or claimed any interest therein as his own. He never assumed or had control or management of the tavern nor of the income or profits therefrom. There was a mutual understanding or agreement between petitioner and Jost that the tavern business in its entirety was her separate property and that the income therefrom was her separate income.

In her verified complaint in the divorce proceeding, petitioner alleged that there was no community property. Jost did not enter his appearance or file an answer, and in the interlocutory decree, petitioner's complaint was taken as confessed, by reason of Jost's default. At a later date, Jost filed a motion to vacate the interlocutory decree and for leave to file a proposed answer making a community property claim against petitioner and in her property. The motion was denied and Jost took no further action and made no further claim.

On March 15, 1943, petitioner filed a partnership return of income for "Catherine Larson and Victor Divers" for the period "beginning Jan. 1942 and ending July 1942." Partnership net income was reported in the amount of \$4,232.10, of which fifty per cent, or \$2,116.05, was shown as petitioner's share.

For the year 1942, petitioner and Jost filed a joint income tax return on March 15, 1943. Reported therein were the wages of Jost from Dacus Oil Company in the amount of \$1,380, and \$2,116.05, representing petitioner's share of the Larson-Divers partnership net income. For that part of 1942 after

petitioner acquired full ownership of the tavern business, she reported a net loss of \$2,556.26. Net income was shown as \$777.29, which, after application of personal exemptions of petitioner and Jost, left no amount as being taxable.

For 1943, petitioner and Jost filed separate income tax returns. On his return, Jost reported \$1,105.89 as his gross income, being his wages from "Young Patrol Service." He stated on the return that he and petitioner had separated July 6, 1943. On the line provided to show credit of income tax paid for 1942, he noted, "Wife will take all credit."

On her return for 1943, filed on March 15, 1944, petitioner reported \$30,782.68 as the total received from the tavern. She reported no other income. Net profit from the business was shown as \$8,289.28, and after deducting \$255 as contributions and \$155 for taxes, net income was shown as \$7,879.28. She claimed credit for her sister as a dependent. The tax reported was \$1,707.75.

On her return for 1944, filed March 13, 1945, petitioner reported total receipts from her business as \$31,352.48, and the net profit therefrom as \$5,589.08. The only other income reported was \$2,484, as rent from "Frame Apartments," and after claiming \$480 for depreciation, \$1,362.27 for repairs and \$638.83 as "other expenses," net return from the apartment was shown as \$2.90. After expenses of the business, \$586.50 was deducted under the heading "Charities." A standard deduction of \$500 was claimed, leaving reported net income at \$5,591.98, on which the income tax was shown as \$1,131.67.

For none of the years did petitioner report opening or closing inventories or the cost of goods sold. Instead, purchases of liquor, beer, wine and supplies during each of the years were deducted from reported total receipts, in arriving at reported net profits, without regard to goods on hand at the beginning and end of the year.

The Larson-Divers return of income and the petitioner's income tax returns for 1942, 1943 and 1944 were prepared for her by a public accountant who had written a letter soliciting the business. Each year, a week or two prior to the final date for filing her income tax return for the preceding year, petitioner supplied the accountant with the "black" book.² He was not employed to make and did not make an audit for petitioner. In the course of preparing the 1944 return, he noticed or heard something which caused him to inquire whether petitioner was receiving rental income. Just how the rents and the charges thereto as reported were arrived at or determined, is not shown. The same accountant also prepared the Larson-Divers partnership return for the period beginning January 1942 and ending in July, 1942. In the preparation of this return, he had the "gray" book available.

Petitioner did not advise the accountant of the income received by her from the coin machines, the

² The testimony of petitioner and the accountant was contradictory as to whether or not petitioner had also supplied him with her bank statements, check stubs and canceled checks. Her testimony was that she did and his testimony was that she did not.

shaking of dice, or any other gambling activities, none of which had been entered by her in the "black" book. Neither did she inform him as to the false entries on the said book indicating that she had made contributions to the Red Cross, U.S.O., and the like, in the amounts stated. The "gray" book and the "black" book and other records kept by petitioner, whether shown by her to the public accountant or not, were wholly inadequate for reflecting her income for the years herein.

Respondent, in his determination of deficiency for 1942, determined \$6,320.77 as petitioner's net profit from business, as against a reported net loss of \$2,566.26, making a total increase in the business net income over that reported by petitioner of \$8,887.03. He made no change in the \$2,116.05 reported by her as her distributive share of profits from the Larson-Divers partnership. He also increased net income by \$303, representing rental income, interest of \$22.44, and \$54.50 representing an overstatement of personal deductions.

In his determination for 1943, the respondent increased petitioner's net income over the amount reported by her by \$14,280.27, representing the total of \$791.28.³ "income increased per audit of records": \$17,030.71 of other receipts not reported; \$324.66, omitted rent income; and \$20.67, omitted interest income, less increased business expenses of \$3,887.05. The respondent also disallowed the de-

³ This amount represented an understatement of sales per the "black" book.

pendency credit claimed by petitioner for her sister.

In his determination for 1944, respondent increased petitioner's reported net income by \$28,-301.10, representing unreported receipts of \$22,-596.49; unreported interest, \$39.13; rent understated, \$519; repairs overstated, \$218.03; reduction in apartment house operating expenses, by reason of personal occupancy of one apartment, \$510.23; adjustment to show cost of goods sold, rents, repairs, and other expenses, as against rents, repairs and other expenses and purchases made during the year as reported, \$3,936.32; and decrease in contributions claimed, of \$481. Deductions were allowed in an increased amount of \$2,821.42. This amount was made up of an increase in salaries and wages of \$1,171.90; increase in taxes on business, \$26.50; loss from theft, \$100; interest on apartment house obligation, \$20.37; taxes paid on apartment house, \$63.69; state income tax, \$44.96; increase in other expenses, \$289; and other losses and bad debts, \$505.

The deficiencies for the three years were due in part to the respondent's use of opening and closing inventories and the resulting determination of cost of goods sold.

Petitioner was tried and convicted in the United States District Court for the Northern District of California for willfully attempting to defeat and evade the tax imposed upon her, under the Internal Revenue Code, for the year 1942. At the same time, she was tried on a similar charge for the years 1943 and 1944, but as to those years, the

members of the jury were unable to agree upon a verdict.

Petitioner's income tax return for each of the years 1942, 1943 and 1944 was false or fraudulent with intent to evade tax and a part of the deficiency for each such year was due to fraud with intent to evade tax.

Opinion

In section 54 of the Internal Revenue Code, it is provided that "Every person liable to any tax imposed by this chapter * * * shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe." Under the regulations promulgated, section 29.54-1 of Regulations 111, it is required that "Every person subject to the tax * * * shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1."

In the instant case, the petitioner has admitted that in each of the taxable years she had substantial amounts of income which were not entered in the "black" book or any other record kept by her and which she did not report on her income tax returns. She also admits that various entries in the "black" book and on her returns indicating contributions

to the Red Cross, the U.S.O., and the Salvation Army were false and that such contributions were not in fact made. Sources of unreported income, according to petitioner, included coin machines in the tavern, the rolling of dice with customers and with her business competitors on Valencia Street, and various other gambling activities away from her place of business.

It is argued by her counsel that all of her receipts, both at the bar and from other sources, were regularly deposited in her bank account and that the "black" book, her bank statements and canceled checks constituted a complete record of all of her income and that upon examination of those records her correct net income could be determined. The difficulty with that argument is that the evidence is to the contrary. According to petitioner's own testimony, various amounts of her unreported income were received in cash and paid out in cash, and did not appear in the "black" book or pass through her bank account. The bank statements show that during the years in question petitioner made deposits in her checking account in the Bank of California on an average of seven to eight times a month, and in 1944, on an average of nine times per month. To what extent the money deposited was from receipts which had passed through the cash register and to what extent from unrecorded and unreported income, we do not know. In any event, the deposits did not include all of her receipts, and we have no way of knowing the amount by which her actual receipts exceeded those deposits. With

respect to disbursements, we have a similar situation. Disbursements were made both in cash and by check. Some were recorded in the "black" book and some were not. Where the unrecorded disbursements were by check, it is possible, in some instances, to draw a conclusion as to whether they were for business or for personal reasons. In other instances, it is not. The extent of the unrecorded disbursements which were made by cash is not shown, and, by the same token, we do not know the amount of the unrecorded cash disbursements which were made for business purposes or the amount so made for petitioner's personal pleasure and benefit.

It is well settled that where a taxpayer has failed to keep books or records as required by section 54, *supra*, and the regulations promulgated thereunder, and from which his or her correct income can be ascertained, the Commissioner has the right to look elsewhere for evidence. *Burka vs. Commissioner*, 179 F.2d 483; *Kenney vs. Commissioner*, 111 F.2d 374; *Bishoff vs. Commissioner*, 27 F.2d 91; and *Frank M. Wiseley*, 13 T.C. 253. See also, *Dawley vs. United States*, 186 F.2d 978; *Bell vs. United States*, 185 F.2d 302. The respondent not being able to ascertain the correct income of the petitioner for the years herein from petitioner's books and records, was obliged to search out the needed information and data wherever they might be found, and in the course of investigations, extending over a period of months, his agents examined and checked the "gray" book, the "black" book, petitioner's bank statements, canceled checks and check

stubs, and any and all records produced by petitioner. They interviewed persons and firms with which she had done business and individuals with whom she said she had gambled. They had a series of interviews with petitioner and her attorney Hyman and sought to have her check and verify such data and figures as to her operations as they had been able to obtain, and much of the data and figures so assembled were corroborated or admitted by her and Hyman in the course of the interviews and they initialed or made notations on certain schedules to that effect. On the basis of information so obtained, the respondent determined the deficiencies herein, which deficiencies are prima facie correct, and the burden of proving that her correct net income was other than that on which the deficiencies were computed is on the petitioner. See *Kenney vs. Commissioner*, *supra*, and the other cases above cited.

Except for a few specific items, dealt with hereafter, and aside from the previously discussed claim that all of her receipts were deposited in her bank account, petitioner's contentions generally are that the respondent's determination of her business receipts was arbitrary and that the figures used in constructing her business income are fictitious and have no relation to fact. Not only, however, has petitioner failed to show by records or otherwise the correct amount of her gross income or of her net income for the years herein, but, when we take into account the admissions made in the course of her testimony as to her unrecorded and unreported

income, we are not even able to determine what the amount is which she now claims as having been her correct income for those years.

One item to which specific argument has been directed is that of the unreported rents paid to Hyman by the tenants of the Baker Street apartments and by him applied first to the cost of operation and then to the principal of the \$10,000 trust. The argument, in effect, is that since she did not assume the trust lien, and during the interval from the date of purchase until the trust was satisfied on July 20, 1944, by her final payment of \$798.40, the rents were received not by her but by Hyman and by him applied as indicated, the rents so collected and applied were not her income. In support of this contention, she cites and relies on *Hilpert vs. Commissioner*, 151 F.2d 929, reversing 4 T.C. 473. The *Hilpert* case, as there decided, is not this case. The United States Court of Appeals for the Fifth Circuit held that the taxpayer had only a right of redemption, and was not the owner of the property in question. Here, the petitioner was the owner of the property by purchase and Hyman received the rents and applied them for her benefit. In short, she was enriched thereby, the rents having been applied in freeing the property from the charge against it to her financial benefit and gain. See and compare *Ward vs. Commissioner*, 58 F.2d 757, affirming 22 B.T.A. 352. The respondent in his determination has made allowance for expenses or other items chargeable against the rents received, and the petitioner has not shown error therein.

Although vague and indefinite as to amount and other essential details, counsel for the petitioner makes some argument to the effect that she should be allowed some added deductions to cover the cost of entertainment. While on her returns petitioner claimed no deductions specifically designated as covering entertainment expenses, there were one or more items on each return which might have included such expenses, and the respondent, in his determination of the deficiencies herein, made no disallowance with respect thereto. Furthermore, we have no such issue before us. The petition contains no allegation of error with respect to the allowance or disallowance of entertainment expenses. In passing, however, it may be noted that Jost, in his testimony at the second criminal trial, stated that there was not much entertainment, except at the bar. We have no reason to believe the situation was substantially different after Jost left, and, so far as appears, the cost of entertainment at the bar, such as free food and free drinks, was fully covered in respondent's determination of the cost of supplies and the cost of liquor sold.

Counsel for petitioner has directed a major portion of his argument to the claim that during a substantial part of the years herein the income from the tavern was community income and only one-half thereof is to be taken into account in determining petitioner's income tax liability for the years before us. In making this argument, he is not altogether clear as to whether in his view the community period contended for terminated with

the date of petitioner's separation from Jost, the date of the interlocutory decree of divorce, or the date of the final decree. If our understanding of the law applicable to the facts herein is correct, however, the period for which the claim is made is of no consequence, since in our opinion the income from the tavern was not community income, but was the separate income of petitioner. Furthermore, as to 1942, petitioner and Jost filed a joint return and, under section 51 (b) of the Internal Revenue Code,⁴ liability for any deficiency in the tax reported is joint and several. Whatever controlling effect *Cole vs. Commissioner*, 81 F.2d 485, cited and relied on by petitioner, may have had as to the question of joint and several liability in such a case, it came to an end with the Revenue Act of 1938, when section 51 (b) was enacted. Also, it is well settled that once the election to file a joint return is exercised by a husband and wife, the election is final and may not thereafter be changed. See *Lamb vs. Smith*, 183 F.2d 938, 943, and the cases there cited.

⁴ Sec. 51. Individual Returns.

* * * * *

(b) Husband and Wife.—In the case of a husband and wife living together the income of each (even though one has no gross income) may be included in a single return made by them jointly, in which case the tax shall be computed on the aggregate income, and the liability with respect to the tax shall be joint and several. No joint return may be made if either the husband or wife is a nonresident alien.

Under section 158 of the Civil Code of California,⁵ either the husband or the wife may enter into any engagement or transaction with the other respecting property, which either might if unmarried. And, it has been held that an agreement between a husband and wife, by which the husband relinquishes all claims to the earnings of the wife, is one which relates to the acquisition of property by the wife and is an engagement or transaction respecting property within the meaning of section 158 of the California Code, *supra*. *Wren vs. Wren*, 100 Cal. 276, 34 Pac. 775. Furthermore, in establishing the existence of such an agreement, "resort may be had to circumstantial evidence. The conduct and actions of the husband with respect to such earnings, indicating that he did not regard them as community property, or that he had relinquished to her the right to dispose of her receipts from that source, would be competent evidence and admissible to prove the agreement." *Kaltschmidt vs. Weber*, 145 Cal. 596, 79 Pac. 272. See also, *Perkins vs. Sunset Telephone & Telegraph Co.*, 103 Pac. 190; *Larson vs. Larson*, 15 Cal. App. 531, 115 Pac. 340; *Smith vs. Smith*, 47 Cal. App. 650, 191 Pac.

⁵ §158. Husband and wife may make contracts. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts. [Enacted 1872.]

60; and Pacific Mutual Life Insurance Co. vs. Cleverson, 108 Pac. (2d) 405.

On the evidence, we are convinced that there was a mutual understanding and agreement between petitioner and Jost that the tavern business was petitioner's separate property and that petitioner's earnings, whether in the operation of the tavern or otherwise, were her separate income. Although under sections 172 and 172 (a) of the Civil Code of California the husband has the management and control of the community property, the contrary was true in the instant case. At no time did Jost assume or have control or management of the tavern business or of the income therefrom. At such times as he assisted petitioner in the operation he accounted to her for the things done and the moneys taken in. The bank account continued in petitioner's former name, Catherine N. Larson, and Jost never at any time had any right or authority to draw checks thereon. Between petitioner and Jost, the business and its proceeds were always treated and handled as belonging to petitioner. The interest of Divers in the tavern was purchased by petitioner with her own money and on her own credit. There was some vague or suggestive testimony that Jost's wages for the short period after the marriage during which he continued in the employment of Dacus Oil Company was commingled with petitioner's assets, to the end that the business and its assets were thereafter community property. Not only was this testimony unconvincing, but the entire course of conduct of the parties refutes such

a conclusion. There was no such commingling of Jost's funds as to affect the rights of petitioner in the tavern business or its profits. And finally, when the divorce was obtained, Jost defaulted and did not contest petitioner's allegations that there was no community property. It is true that after the interlocutory decree was entered on the basis of such default, Jost did file a motion to reopen the matter and for leave to file an answer making a community property claim, but, according to petitioner's testimony, this was after she had refused his importunities that she take him back as her husband and he was then using threats to the effect that, if she did not, he would take her business away from her. Furthermore, the trial court denied the motion, and Jost never pursued the matter any further.

After careful review and consideration of the evidence, it is our conclusion that petitioner has failed to show that the respondent erred in his determination of the deficiencies herein or that her correct net income was in an amount less or other than that on which the deficiencies were determined. In reaching that conclusion, we have not overlooked the argument to the effect that she is entitled to deductions in some unstated amounts to cover gambling losses. The argument made seems to be the aftermath of certain claims of deduction falsely made by petitioner on her returns for contributions to the Salvation Army, the Red Cross, the U.S.O., and other comparable organizations, which contributions were not in fact made and the claims therefor are now admitted to have been false. It was

petitioner's final testimony that the amounts in question were in fact gambling losses, which were entered in the "black" book as contributions, for the reason that she did not wish her "bookkeeper" to know that she had sustained such losses through gambling. On the basis of those statements, her counsel argues that she is entitled to gambling loss deductions, under section 23 (h) of the Internal Revenue Code, which provides that "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions."

Obviously, the deductions as they were claimed on the returns would not have been allowable, even though it be assumed that the petitioner finally told the truth when she testified that the amounts falsely denominated contributions to the Red Cross, and the like, covered losses from gambling, since no gains from gambling were reported on the returns; and under section 23 (h), *supra*, gambling losses are allowable deductions "only to the extent of the gains from such transactions." It is thus apparent that as made on the returns the claims, in effect, would have been claims for the deduction of gambling net losses, which the statute does not permit. It is now said, however, that much, if not most, of petitioner's unreported income was from gambling and that it follows, as a consequence, that her gambling losses, whatever they were in amount, but in any event those falsely claimed on her returns as contributions, are deductible. Frankly, we do not know whether any of the added income now admitted by petitioner and which she failed to re-

port represented gambling winnings.⁶ She did so testify, but after hearing her testify and observing her in the course thereof, we are unable to say that her final story is any nearer the truth than her first. We do know that in each of the taxable years substantial amounts of petitioner's unreported income were not from gambling on her part, but from the playing of the coin machines by her customers. Certainly none of the amounts now claimed as gambling losses represented losses from rolling dice for cash at the bar. According to petitioner's own description of her operations in that connection, she paid such losses in cash from her winnings which were neither entered in the "black" book nor reported on her returns. Thus only the net profits from dice at the bar could have been taken into account in the determination here. As a consequence, the most we are able to say with respect to the claim is that petitioner's final story was that she gambled extensively, particularly in the years 1943 and 1944, and that, while she couldn't explain it, she was very lucky and won substantially more than she lost. If such was the case, however, and she was the lucky gambler claimed, we are unable, on the record here, to say that such part of the added income herein as might have resulted from gambling was in excess of her net winnings.

A further claim made in petitioner's behalf is that the assessment and collection of the deficiencies

⁶ The respondent's agents were unable to verify her claims through the individuals with whom she said she had gambled.

are barred, under the provisions of section 275 of the Internal Revenue Code,⁷ in that her returns were timely filed and the periods prescribed in that section and within which the respondent might act had expired prior to his determination of the deficiencies herein. It is the claim of the respondent, on the other hand, that the returns were "false or fraudulent * * * with intent to evade tax," and, under section 276 (a) of the Code,⁸ the tax may be assessed "at any time."

That the returns were false is not a disputed

⁷ Sec. 275. Period of Limitation Upon Assessment and Collection.

Except as provided in section 276—

(a) General Rule.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(c) Omission from Gross Income.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

⁸ Sec. 276. Same—Exceptions.

(a) False Return or No Return.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

matter. Petitioner has admitted that substantial amounts of income were omitted from her returns and that some of the claims of deduction were false and did not reflect the truth. She denies, however, that the falsity of the returns was due to an intent to evade tax. Her contentions, in the main, are that she did not know that gambling winnings or income from coin machines were taxable income; that for the purpose of having her returns made, she turned all of her records over to an accountant who, she thought, was competent and depended upon him to make correct returns for her, and finally, that such errors as may be attributable or chargeable to her were errors due to ignorance and not due to intent to evade tax. While certain matter appearing in the record could not be taken as a favorable recommendation of the accountant's ability in preparing the income tax returns, we do not believe the petitioner's protestations that she thought she had made a true and correct return of her income and that none of the errors therein was due to any intent on her part to evade tax. We base this conclusion on impressions obtained from seeing and hearing her testify and from our examination of other evidence of record. Her testimony varied from time to time on many of the items involved and at times was in direct contradiction of that given at another. To illustrate, she at first declared that the purported charitable contributions as entered in her "black" book were, in reality, payments to the police and were so made because she did not desire to create a situation wherein the

recording of their names or a correct description of the payments might prove embarrassing to them. It was not until later that her testimony was that they represented neither charitable contributions nor payments to the police, but gambling losses. Whatever may have been the shortcomings of her accountant, we are convinced also that the omissions of income from the coin machines or other unrecorded sources were not omissions for which he was responsible, nor due to ignorance on the part of petitioner, but to an intent on her part to evade her just tax. Having so concluded, it follows that there is no limitation on the period within which the respondent was authorized and permitted to determine the deficiencies in issue herein.

The final issue is whether the respondent erred in his determination of the 50 per cent addition to tax, in each year, for fraud. In section 293 (b) of the Internal Revenue Code,⁹ it is provided that if any part of the deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency, in addition to the deficiency, shall be assessed, collected, and paid. On the evidence of record, we have concluded and found that a part

⁹ Sec. 293. Additions to the Tax in Case of Deficiency.

* * * * *

(b) Fraud.—If any part of any deficiency is due to fraud, with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

[Title of Tax Court and Cause.]

MOTION FOR RE-HEARING, FOR RECON-
SIDERATION AND FOR CERTAIN FIND-
INGS

To the Honorable Above Entitled Court:

Your Petitioner Catherine O'Connor and moves for a re-hearing on the issues of fact and law in the above entitled matter; moves for a reconsideration of the issues of fact and law; moves for findings of fact on the issues of the amounts of expenses and deductions for the year 1942; moves for a finding of fact on the issues of the amounts of expenses and deductions for the year 1943; moves for a finding of fact on the issues of the amounts of expenses and deductions for the year 1944; moves for a finding on the issue and motion for exclusion of evidence obtained by unlawful methods, and all evidence obtained as leads therefrom; move for a finding on the issue that the accounts and deficiency of the Commissioner were based upon the accounting, work and investigation of Special Agent Tormey, and that he was motivated by improper motives and the issues of his solicitations of considerations for himself and a blond girl friend during the investigation he made.

Said motion for a new trial will be made upon the grounds that the Court refused to permit the Petitioner to prove by the witness Krause the items and amounts of the expenses and deductions for each of the years, stating that all of the records and proof by the primary records and testimony and the Court would make its own accounts there-

from, and refused to permit the Petitioner to make proof by an accountant therefrom; that by reason thereof and the failure of the Court to make findings thereon, Petitioner has been denied Due Process of Laws, 4th Amendment, United States Constitution; said motion is on the further grounds that the findings are against the evidence, that the decision is against the law, and upon errors of law occurring at the trial, and excepted to by the Petitioner. That the motion for reconsideration is upon each of the foregoing grounds specified for a new trial. That the motion is made for specific findings upon issues presented at the trial covered in Petitioner's Briefs filed with the Court, and not covered in the decision.

That Petitioner requests that the Motion be heard and on the calendar of the Court when it sits at San Francisco. If under Rule 19b the Court in its discretion determines this motion shall be acted upon without placing the same on the Calendar of the Court at San Francisco, Petitioner requests leave to submit a written Memorandum in support of this motion setting forth in detail each point and specifying the reasons therefor on this motion in detail required by careful practice of law to properly present the motion for consideration by the Court.

February 17, 1954.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioner

[Endorsed]: T.C.U.S. Filed February 18, 1954.

[Title of Tax Court and Cause.]

ORDER

The above-entitled proceeding was heard on March 17, 1954, on petitioner's motion for "Re-hearing, for Reconsideration and for Certain Findings." The motion, the memorandum of the petitioner with respect thereto, and the statements made by counsel for the respondent have been carefully examined and considered and the Court has found nothing therein which was not given full and careful consideration in the making of its findings of fact and in the stating of its opinion entered herein on January 22, 1954, and it is the conclusion of the Court that the motion is not well taken.

Premises considered, it is

Ordered: That the motion be and is denied.

Dated: Washington, D. C., April 6, 1954.

[Seal] /s/ BOLON B. TURNER,
 Judge

Served April 7, 1954.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

The above-named petitioner Catherine O'Connor hereby petitions for review of the "Decision" dated January 25, 1954, in the above-entitled matter, and from the whole thereof, and petitions for review of the "Order" of the above-entitled Court in the above-entitled matter of April 6, 1954, denying said

petitioner's motion for "Rehearing, for Reconsideration and for Certain Findings." Petitioner declares she seeks said review in the Circuit Court of Appeals of the United States, in and for the Ninth Circuit; states that at all times herein mentioned she was and is now a resident of the City and County of San Francisco, State of California, and has filed all her personal income tax returns, including the tax returns involved in the above-entitled matter, with the Collector of Internal Revenue, San Francisco, California. That the nature of the controversy in the above-entitled matter is the amount of income and deductions subject to personal income tax for the calendar years 1942, 1943 and 1944, for the redetermination of the said tax in each of said years, and the imposition of fraud penalties in each of said years.

Wherefore, petitioner prays that a review be had by said Circuit Court of Appeals of the United States, in and for the Ninth Circuit, of said "Decision" and of said "Order" and of the whole thereof, in the manner and form provided by law and the rules of Court, and petitioner prays generally.

Dated: April 20, 1954.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Catherine O'Connor,
Petitioner

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed April 22, 1954.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 51, inclusive, constitute and are all of the original papers and proceedings, excepting Petitioner's exhibits (1, 3 through 6, 9, 10, 13 and 14 (2, 11 and 12 appearing herein as Respondent's exhibits, 7 being marked for identification only, and there being no 8), Joint exhibit 8-A, and Respondent's exhibits B through S, and Joint exhibit 15-T), which are separately certified and forwarded under separate cover, on file in my office as the original and complete record in the proceeding before The Tax Court of the United States entitled: "Catherine O'Connor, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 24206" and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 11th day of June, 1954.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States

The Tax Court of the United States

Docket No. 24206

CATHERINE O'CONNOR Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Court Room, U. S. Appraisers Building, 630 Sansome Street, San Francisco, California, November 13, 1950.

Met, pursuant to notice, at 10:00 o'clock a.m.

Before: Hon. Bolon B. Turner, Judge.

Appearances: Howard B. Crittenden, Jr., Esq., Central Tower, San Francisco, California, appearing on behalf of Petitioner. Leonard A. Marcussen, Esq., (Hon. Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), appearing for Respondent. [1*]

Mr. Crittenden: At this time I want to object to Mr. Marcussen appearing in this case because of an incident that took place in April of 1950, and I am going to draw to your Honor's attention that it is a difficult thing for me to present. I trust your Honor appreciates my position here, and it involves a constitutional right, and a substantial right of my

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

client, and it is for that reason that I have to urge it.

In April of 1950, Mrs. O'Connor was enticed into the office of the General Counsel, in my absence, and there interrogated as to the merits of the case, which was contrary to my consent. I have the correspondence here that goes through and covers this.

Evidence illegally obtained or evidence, the source of which is obtained by illegal means, is not admissible in the Federal jurisdictions. That is the Federal Rule on this point.

In this case, counsel will undoubtedly call upon knowledge and matters of fact he illegally obtained, in cross examination of the witness, and I wish at this time to [3] offer in evidence, if I may—I believe you will stipulate that these are copies of the correspondence.

Mr. Marcussen: I will stipulate, subject to change.

Mr. Crittenden: These are my office copies of the letter of April 11, 1950, April 4, 1950, and this is Mr. Neblett's letter—Division Counsel—letter of April 10, and his letter of April 12. This covers this point, your Honor.

I have a stipulation which says they may be used as though they were the originals, and that the originals may be proofed.

Mr. Marcussen: No objection to the authenticity, subject to a detailed check with those letters.

Mr. Crittenden: Now, starting off on this——

Mr. Marcussen: Just a moment. I am going to object to their introduction in evidence, upon the

merits, or their going into this record. They have nothing to do with the issues in this case, and counsel's statement is patently false, that the taxpayer was induced into the office of the Technical Staff—enticed into that office—and I further state that the Respondent has no intention of introducing any evidence of what occurred at that conference. It has no materiality on the case.

I will further state to your Honor that we received no information from Mrs. O'Connor at that conference, except [4] a story as to her poor financial condition. That is what happened. She came into the office voluntarily, and I object to these being read into the record, these letters being read into the record, only for that reason.

The Court: Now, as I understand it, you are fixing to present matter for the purpose or in the course of a request that Mr. Marcussen be barred from participation in the case. Is that it?

Mr. Crittenden: That is right, your Honor.

The Court: Well, I will dispose of that right now. I am not particularly interested in any showing of that kind. Now, when it comes to evidence in the case, why, then I will rule on the admissibility of evidence.

Mr. Marcussen is the duly-assigned counsel of the government to this case, and so I will recognize him in this case. Now, if there is a question that comes up about the acquisition of testimony, and the way in which it violates any constitutional rights of the Petitioner, that is another matter and will go to the

admissibility of the evidence and its propriety and use in the case here.

Mr. Crittenden: Of necessity, anything that he learned from my client that he would use in obtaining evidence or in cross examination of her or examination of any witness, would of necessity go to this point, and it is necessary for me, your Honor, to present this question—if you wish to [5] reserve ruling——

The Court: I am not going to reserve any ruling. I am ruling that the motion is denied on that.

Mr. Crittenden: May I have these marked for identification? There are four letters.

The Court: But, when it comes to admissibility of evidence on the issues involved in this case, I will hear your objection.

Mr. Crittenden: I have to raise this timely, and this is the only way I can raise it, outside of presenting it through administrative channels.

The Court: I don't mind the record showing that you raised it, but I just don't want to waste any time on it.

Mr. Crittenden: But my record must be complete.

The Court: Let's get along with the record, then.

Mr. Crittenden: We have resolved a lot of problems and maybe we have passed them to your lap. I have here a certified copy of the transcript of the trial before the District Court, records which went to the Ninth Circuit in this case, and I take it that counsel will stipulate that this will be considered by the Court, that the witnesses appeared and the

Court may consider the testimony and any stipulations therein contained.

Mr. Marcussen: Wouldn't it be better to wait for that until after the opening statement? [6]

Mr. Crittenden: If you wish. I thought we would clear the deck.

The Court: I would rather have the opening statement now. [7]

* * * * *

Opening Statement on Behalf of the Petitioner
By Mr. Crittenden

Mr. Crittenden: So that your Honor will understand the issues as they are presented, this originally arose as a criminal indictment under an evasion of tax. It was tried twice in the District Court. Your Honor will have the benefit of those records before you. We are relying, for the most part, on the testimony taken there, rather than going through and culling and pulling out the matters that might be different issues here than there.

I appreciate that the issues are considerably different in this case than they were at that time. Secondly, after the three-year statutes ran in all three years of 1942, 1943, and 1944 a registered letter to the attention of the assessed was sent to my client—more than five years—as to the two years of 1942 and 1943.

There is a claim that my client, who ran a bar on Valencia Street, made more money than she reported in her income tax, and our contention is that, although the accountant, when he made this up, understated income, he also understated the

deductions by the same amount, and the result is approximately the same—undoubtedly more income than is shown, but also more deductions. [8]

The government contended there is a fraud in each one of the years and there was extensive testimony at the time of the first and second trials. I think it would be better to go into that in a brief, rather than to outline it at this time.

So, we have the deficiency of the Statute of Limitations. We contend that there is no understatement of the ultimate amount of taxable income, nor of tax for any one of the three years, and if there is, it is barred by the Statute of Limitations in this instance.

I think that will be of assistance in arriving at the point. The pleadings start off with the allegation where we set forth the letters, attacking the letters wherein there is the issue of the increase in claimed amount. The Respondent appeared in this case and plead the fraud.

Now, your Honor will find that most of this stuff that we have covered will appear in these records, so I don't think there is any need of rehashing at this stage.

The Court: All right, Mr. Marcussen.

Opening Statement on Behalf of the Respondent
By Mr. Marcussen

Mr. Marcussen: If your Honor please, this case involves deficiencies and tax penalties for the taxable years of 1942, 1943, and 1944. The penalties assessed are fraud penalties. [9]

The evidence will show, as counsel stated, that Petitioner here was twice tried upon a criminal indictment for evasion of her income taxes for those three years. The jury disagreed in the first trial and in the second trial disagreed as to the first count in 1942—or rather agreed on 1942 and disagreed as to the other two counts, covering 1943 and 1944.

It is true, as counsel has stated, that we intend to present this case by introducing in evidence the entire transcript of the evidence in the second trial, and I understand that counsel wishes certain other pleadings and papers. I wish to have the pleadings, but there are certain other motions which were made in criminal trial which he wishes to have in. While we object to the materiality, we have no objection to their going into evidence.

In addition to that, there will be presented and stipulated into evidence portions of the testimony that was offered in the first trial. The Respondent would like to offer specifically the testimony of the government's investigator in that case, Mr. Paul Tormey and the testimony of the Petitioner, Mrs. O'Connor.

The government would also like to introduce the testimony of two other witnesses who were representatives of Lachman Bros. Furniture Company here in San Francisco and also a jewelry store, I think it is Brilliant Jewelry Store. [10]

In addition to that, it has been our intention to present the case in as orderly a fashion on the stipulation, so that the hearing of the case may be facilitated.

Now, I won't go over at the present time the detailed allegations of error contained in the petition which are at issue here, but will proceed first to a consideration of one of the most important issues, namely, the fraud issue.

Fraud is established in this case by evidence which will show that this Petitioner obliterated her books, that she made false entries into her books, and that she failed to report substantial sums of income—interest and rental income—received by her on property that she owned, and also property that she held under lease; but primarily upon a very gross understatement of her business income.

The Petitioner operated a bar in the City of San Francisco, as counsel has stated, and during those years she purchased a one-half interest in that bar, several years prior to 1942, for \$1,000.

In that year, 1942, she purchased the other half and became the sole owner on July 15, 1942. The evidence will show that a partnership return was filed for the first half of the year 1942, and that no contest or challenge is given to the computation of the partnership, of that return which has been accepted by the government.

The evidence will show that the books for the [11] partnership—the records, rather, for the partnership, were kept in this gray book, which will be referred to in this trial. The evidence will show that she continued, for a period from July 15 until August 23, 1942, to keep her records in this book; that thereafter she obliterated the figures of receipts shown in that book, and transcribed them into a

new book, the black book, which she continued to use for the balance of the taxable years in question here.

The evidence will show that the items of receipts, as re-entered into that book for that period of time, July 15, until August 23, were on the average \$17 a day less than the receipts; for the period, for the corresponding period, in the gray book.

That covers the fraud issue, the government's case with respect to fraud is predicated primarily upon the understatement of those receipts which vary from approximately \$7,000 for the first and last half of the year 1942, to approximately \$20,000 for the years 1943 and 1944.

Now, there are other issues which are presented to your Honor by the Assignment of Error contained in the petition. Counsel has adverted to the fact that he has raised the question of the Statute of Limitations. Obviously that would have no application if the fraud penalties are sustained. Those assignments of error are contained in, I believe, the first five sub-paragraphs of Paragraph IV of the Petition. [12]

I think the evidence will show that with respect to the last taxable year, namely, 1944, that the Petitioner understated her gross income by an amount which is in excess of 25 per cent of the gross income reported by her return, so that, in any event, the Statute of Limitations does not bar the assumption of the defense for that year.

Respondent has not filed a pleading to that effect and Respondent will move, before the hearing is

over, to amend the pleadings to conform to the proof, so as to invoke the five-year Statute of Limitations.

The issue of fraud is raised by Assignment of Error No. 6 of the Petition. Then there follow Assignments of Error; 7 and 9 are to the general effect that there was no understatement of business income for the year 1942. Similar allegations to the same effect are made for each of the taxable years. Then there follows in Sub-paragraph 10 of Paragraph IV, allegation to the effect that the assessment is erroneous, in that it does not give the Petitioner credit for losses that she sustained. We know nothing about those losses, but we think the evidence—we do have evidence that will, I believe, demonstrate that she has been allowed everything that she would be entitled to in the claims that have been made heretofore.

Now, Assignment of Error 11 raises, I presume, a purely legal matter, or I shall call your Honor's attention to [13] the fact that, for the year 1942, the return filed was a joint return of the Petitioner and her husband.

She contends, in substance, I think, in this Assignment of Error, that it was erroneous to include her husband's income in her return for the first three months of the year, of the year prior to her marriage to her husband, in March, 1942. That is a purely legal matter, and I think the law will show that there is no error with respect to that point.

Now, calling your Honor's attention to Assign-

ment of Error No. 12, the Petitioner alleges that, for the taxable year 1942, the Commissioner erred in failing to give her credit, in charging her, rather, with her husband's one-half share of the community income. The evidence will show that the Petitioner married her husband in March, 1942, that he was employed at the time and continued to be employed by a third party for a couple of months after the marriage. Thereafter he discontinued that employment and went to work for Petitioner in her bar.

The evidence will show that she was divorced and filed a complaint for that divorce sometime in the year 1943, and that she alleged that there was no community property at that time. I should add to that that that divorce was a default divorce. There was no mention in the decree, the interlocutory decree or the final decree, of the property rights [14] of the parties. Under the decided cases in the California Courts, under that state of the pleadings, the judgment operates as an adjudication of the property rights of the parties, and established that, up to the time of the filing of that petition, or rather, complaint, by the Petitioner, there was no community property. That would therefore cover all the years 1942 and all of the year 1943 up to the date of her pleading in the divorce.

Now, with respect to the subsequent period following the filing of the complaint, the evidence will show here that the parties filed their returns and filed only their own respective income and, under the circumstances, it seems to me that that would preclude any contention to the effect that there was

any community property after the filing of her complaint in the divorce action.

Now, that assignment of error again is made with respect to all three of the years here.

Now, I refer to Assignment of Error 18 contained in Paragraph IV of the Petition, and it states there that the statement of 1943 tax does not give your Petitioner credit for other income (including rentals) as a loss of \$28.60. Respondent doesn't know what that assignment of error is. It is quite incomprehensible to us.

Now, turn to Assignment of Error 19, which is to the effect that she was denied a proper deduction of \$410, [15] for the year 1943. We will be prepared to show that she was allowed that deduction and, in addition, \$338.50, which she did not claim on her return.

Assignment of Error 21 appears to be a general buckshot assignment of error to cover anything that apparently was omitted, I presume, in view of the fact that the rules of Court require detailed specifications of error that we can disregard that.

Mr. Crittenden: I just didn't receive all that purported information, and 21 states it is not attached to the Complaint as referred to in that letter and specifies that any such claimed adjustment of disallowed deductions are erroneous. I don't know what they were. If they didn't serve me with a copy, I am not in a position to answer. I think it is quite comprehensible.

Mr. Marcussen: Well, for what purpose it may serve, I will state that I don't know what it refers

to. Perhaps counsel and I can work that one out.

Now, referring to Assignment of Error contained in Paragraph 23 of the Petition, it is alleged that the Commissioner erred in not giving your Petitioner credit for the loss of \$1,295.74 for other income (rentals), that is incomprehensible to us.

Now, turning to Assignment of Error 24, the Petitioner alleges error in not depreciating certain items over [16] the period of three years that were involved here, the value of certain fixtures, which she acquired when she acquired this business. I do not know now just what her case is predicated upon, but I am sure the evidence will show that there was no error committed in disallowing any item alleged here in that paragraph.

That covers the issues in the case, if your Honor please.

The Court: All right, you may proceed.

Mr. Crittenden: One point, I think, should be cleared up. There was conviction on the first count in the year 1942; however, in that trial and both trials, it was specifically argued by me that the charge for which the Defendant stood indicted involved the issues of fraud, and the District Court adjudicated that it did not. How I lost that point, I don't know, but that is the fact. We have an adjudication in that case. I am familiar with the rulings of this court that, ordinarily, a conviction for evasion of income taxes is *prima facie* a case of fraud for the government, but I am also familiar with the point that, if there is adjudication in that case, a direct adjudication of that point, then it

wouldn't be *prima facie* proof of a matter that was previously excluded as an issue in that case. I have the transcript here.

The Court: I don't know what the significance of your statement is. [17]

Mr. Crittenden: I will explain to your Honor. She was convicted under Section—whatever section she was tried under here. In the District Court, I should say it is ordinarily taken by the Tax Court as *prima facie* evidence of proof of fraud—conviction in the District Court. Now, that is ordinarily true, but where the District Court specifically adjudicates that, it does not involve the issue of fraud, then it would not be *prima facie* proof in that court, if your Honor follows me.

The Court: I hear what you say, but I don't know wherein I am going to have to deal with it. What do you want me to do?

Mr. Crittenden: I am just calling your Honor's attention to the fact that that will be one of the proofs.

Now, starting our case, I have here a number of volumes, 1, 2, 3, 4, and a supplement—four volumes of the transcript of the entire record of proceedings and pleadings in the District Court trial, involving Catherine O'Connor against the United States.

We are going to offer by stipulation—the Court may consider any of the evidence that was taken in that testimony. We will, of course, go over it in briefs and assist your Honor in picking out the important points.

Mr. Marcussen: Again, it is my understanding that our stipulation is that the only material that is offered in [18] evidence here is what was successfully introduced at the criminal trial. Is that correct?

Mr. Crittenden: Yes, but I understand—I am going to make an offer of proof of matters which were excluded and his Honor may rule on them.

Mr. Marcussen: But, as far as the stipulations are concerned, that covers merely the matter which was admitted in the District Court. Statements of Counsel and matters excluded and matters that were ordered out of the record are not a record in this case.

Mr. Crittenden: But there is another point. We stipulated to a number of things in that case, government counsel and I did, and the stipulations will still be binding.

Mr. Marcussen: Binding here, and I would like to add further that counsel assures me that there is a certified copy of this record, and I have not had an opportunity to read this particular copy in full, and I would like to reserve, make a reservation, subject to check, for any errors which may appear when compared with the official copy.

Mr. Crittenden: May I state this: This has the official certificate of the Clerk of the United States District Court. I obtained this from Mr. O'Brien, Clerk of the Ninth Circuit. It was certified by the Clerk; this was sent to the Ninth Circuit as a Mother Hubbard record in that case. It includes the transcript and such matters as that, so I want [19]

to be sure that what I am getting here is the proper record. I have to return this to Mr. O'Brien. It says here, "Return to Paul P. O'Brien, United States Court of Appeals, Box 547, San Francisco, California."

I had to sign the memorandum.

The Court: This is part of the Court of Appeals' records?

Mr. Marcussen: The entire transcript of the second criminal trial.

The Court: The record will show the agreement of the parties. The transcript is received, subject to agreement and understanding that it is part of the record in this case.

Mr. Crittenden: May I ask your Honor that, at the termination of this case, and when the matters of evidence are returned, that this will be sent to Mr. O'Brien, by the Clerk. If it is not, I am going to be in a very bad position, if this is lost, because I have signed a written statement of indemnity for any cost of replacement.

The Court: I am going to put some responsibility on you of calling the matter to the Clerk's attention, when the decision in this case becomes final.

Mr. Marcussen: Now, if your Honor please, at this time I would like to request that, on behalf of both counsel for the Petitioner and myself, that we may withdraw this record for use in preparing briefs, and all the exhibits in [20] the case, and submit to the Court when the briefs are filed.

Mr. Crittenden: That is agreeable, your Honor.

The Clerk: That is Item No. 5.

(The documents referred to were marked and received in evidence as Petitioner's Exhibit No. 5.)

Mr. Crittenden: I have the exhibits here which were offered, and some of them are marked for identification and some are marked "Admitted." They will be seen by the Court. I want to move that those matters which were marked for identification and excluded, when your Honor considers these matters, your Honor will consider and make independent ruling on each one of those points.

Mr. Marcussen: Those are not included within the scope of our stipulation, you understand.

Mr. Crittenden: I understand they are not admitted, but they are being put in for the Court's consideration.

Mr. Marcussen: No, they were not a part of the record in the criminal case. It was not so stipulated, and if there is anything else you want to offer, I would like to reserve objection on the part of the Respondent.

Mr. Crittenden: I will have to go through here.

The Court: I think, for the purpose of this case, documents excluded there would have to be offered here as a primary matter.

Mr. Crittenden: Now, I don't want to pick out each [21] page of the transcript and make an offer in the same form. I thought it would save your Honor's time if I moved for their admission, and your Honor can reserve ruling.

The Court: I don't reserve ruling. I try to make my record as I go along. I find that it is doing double duty to reserve a ruling, and then I am away from the trial, and it is a whole lot easier here when it is right here before me and I have both counsel before me to hear what they have to say, and make a ruling then.

Mr. Marcussen: There is another matter which should be called to your attention, and that is the numbering of these exhibits, and it is my suggestion that the same numbering that was used in the criminal trial be used here. It is the reverse of what we do here. I think the letters were assigned to the Defendant, and the numbers were assigned to the government, and if that is satisfactory to the Court, we will continue numbering by that procedure here.

The Court: No, I think that we will just have to, in using the exhibits from the other records made in the other procedure, use due care, when reference is made, to show it is that, because we have already started numbering, and I think, for the purposes of the court, it would be easier to do it that way than to try and reverse all of this.

Mr. Crittenden: I think they could be taken as a composite exhibit; otherwise, your Honor won't be able to find [22] what goes into the record.

The Court: Those are a part of Exhibit 5, those that are made a part of that record?

Mr. Crittenden: That is right. We will put all of these exhibits in with this record.

The Court: They are sub-2 to Exhibit 5. Now, this transcript is received as Exhibit 5, and all of

these, as I understand it, were documents and papers that are a part of that record.

Mr. Crittenden: That is right, your Honor.

The Court: And were received, so they are sub-exhibits to Exhibit 5 in this proceeding?

Mr. Crittenden: That is right, your Honor.

The Court: So we will move along in that way.

Now, these others—I don't know whether they were marked for identification or anything of that kind, but these others, even though they do have some reference to them in Exhibit 5 here, these, of course, having been ruled out here, that are being offered here, those that were received, will come in as primary exhibits here, if they come in.

Now, those documents you have in your hand, those envelopes, as I understood it, are documents that were received and are exhibits in the prior proceeding?

Mr. Marcussen: That is correct, sir.

The Court: They are part of Exhibit 5. [23]

Mr. Marcussen: Then all of the exhibits will be a part of Exhibit 5?

The Court: Well, those that were admitted, yes.

Mr. Marcussen: Then I presume at this time I should offer the exhibits which were offered by the government in the criminal trial.

The Court: Those that were made a part of the record.

Mr. Marcussen: I will offer them now.

The Court: You may later on want to—well, no. I think you would just have to proceed as if they were part of that record.

Mr. Marcussen: They are a part of that record, your Honor.

The Court: Now, let me see that bunch of envelopes there.

Mr. Marcussen: These are bank statements and checks, if your Honor please, and they were offered, I believe, as government exhibits.

The Court: I notice the stamp number 11,911. That is a docket number, or something.

The Clerk: Yes, the docket number of the Circuit Court of Appeals.

Mr. Marcussen: Offered in the criminal trial as government's Exhibit No. 6, if your Honor please; they really should not be offered at this time. [24]

The Court: I have already accepted them; if they are part of that transcript, I have accepted whatever was marked into evidence there. There are 31 of these envelopes.

Mr. Marcussen: Then, as a part of that exhibit, I will offer Exhibits 1 to 34, produced on behalf of the government. They are part of that exhibit. I have them arranged in file folders there.

The Court: They are a part of Exhibit 5 here.

Mr. Marcussen: May the record show what is going in now? That is, what exhibit?

Mr. Crittenden: I will read them out to you, if you wish me to. A, B, D, E, F, H, I, J, G, K, L, O.

The Court: All right; now, those numbers are exhibits numbers that were given to those documents in the prior proceedings and were not admitted?

Mr. Crittenden: They were admitted.

The Court: Those were admitted and constitute the part of the record—they are part of Exhibit 5 in this proceeding?

Mr. Crittenden: And part of Exhibit 5 consists of writing on one of the check statements which was blown up for the record.

The Court: The original is in.

Mr. Marcussen: G for identification, in the criminal trial. [25]

Mr. Crittenden: Here is a blow-up of one of the other exhibits of handwriting, as used by the handwriting expert. That is one of your exhibits.

Mr. Marcussen: This didn't get in the trial.

Mr. Crittenden: I forgot to put it in. The original is in the exhibit. This is a copy that the expert witness testified from.

Mr. Marcussen: If you forgot to put it in, I will stipulate that it may be offered. If, however, the record shows that this was offered and denied, Respondent will not acquiesce in admission now.

Mr. Crittenden: This is for the handwriting experts. I will show you the original that was used by the handwriting expert.

Mr. Marcussen: No objection to that.

Mr. Crittenden: Now, your Honor, the accountant wrote a letter to the attorney that was associated with me, on July 28, 1947. We proved the signature, and he says in here—this is put in for the purpose of showing the lack of intention of my client, and the lack of knowledge, and the fact that her accountant knew at the time because he says, "I was very much surprised"—

Mr. Marcussen: I object to his reading it into evidence.

Mr. Crittenden: I am letting his Honor know what I [26] have got here.

The Court: Let me see it.

All right, you are offering this?

Mr. Crittenden: In evidence.

The Court: Was this an exhibit in the other trial?

Mr. Crittenden: No, they ruled against me.

The Court: Now, these others that you have just covered, they weren't put in either?

Mr. Crittenden: Marked for identification, and this was marked for identification. The Judge ruled against me on this.

Mr. Marcussen: As I understand it, this is a copy of a letter from Mr. Bosserman, who was the taxpayer's accountant, and addressed to her attorney, Mr. Maurice Heyman, and this letter was ruled out in the trial below. It has no materiality to the issues in this case. That matter was passed upon in the criminal trial, and if this is offered in evidence, it is going to be necessary for me to call Mr. Bosserman here and go into details of the statement. It does not impeach him, in any sense. It is a self-serving declaration.

I might say that the basis, the entire basis, of the criminal trial here was to try everybody but Catherine O'Connor. The basis of the trial was to try the accountant and to blame it onto him.

The Court: Who is he? [27]

Mr. Crittenden: A government witness.

The Court: Called by the government?

Mr. Marcussen: Yes.

Mr. Crittenden: May I point this out? Mrs. O'Connor, in February, 1943, never having filed an income tax return theretofore, having no necessity for filing one, knowing that she knew nothing about income tax, this man represented himself as a skilled accountant with some 40 years of experience and licensed to practice before the Federal District Court—she provided him with all the information he requested, all of her books and records and even the government's disputed records, which is that instrument which they claim is the basis of the fraud. She made a complete disclosure—the gray book. All of this information, including the checks, were given to Mr. Bosserman, and Mr. Bosserman undertook to make out a return. He told her to sign it. She did it, and she sent it in and make a tax payment on the basis of that.

Then Mr. Bosserman appeared in this case for the government and, in 1945, delivered the gray book which they claim is the basis of fraud in this case, which was supplied to the accountant and used by him in making up returns, by his own testimony, he delivered that to Agent Krause in 1945 when the investigation started, and made no effort to communicate with Mrs. O'Connor in the matter.

Now, we have to show that she knew nothing about taxes, that she employed a person who was skilled or a person she believed was skilled. She relied upon his judgment and, having done that, would not be guilty of fraud, just because the gov-

ernment comes up with a different figure on the same information and same data that she had.

It is immaterial to this case that she had no knowledge and consequently there was no wrongful intent on her behalf and she had a right to rely on him. Now, this language shows the state of mind that she had and he had as of 1947, that she knew absolutely nothing about taxes and relied upon him in making up the returns. Now, that is the materiality, and I think it is quite material, your Honor, in the question of fraud.

The Court: For what purpose was it offered in that proceeding?

Mr. Crittenden: To show the question of intention.

The Court: Whose intention?

Mr. Crittenden: The state of mind of Mrs. O'Connor and Mr. Bosserman, that Mrs. O'Connor was relying on him.

The Court: Upon what ground was it ruled out?

Mr. Crittenden: I hate to say this, but the Judge ruled with the District Attorney on all occasions. He just said it happened after the return was filed.

The Court: For what purpose? [29]

Mr. Crittenden: Showing state of mind.

The Court: By whom?

Mr. Crittenden: Of Mr. Bosserman, that he knew she was relying on him when he made up the statement.

Mr. Marcussen: It is not an issue in this case. The only thing that is at issue in this case is Mrs. O'Connor's state of mind, as stated in 1947, three

years after the last year in question here, and it is simply a letter by Mr. Bosserman, the Petitioner's accountant, addressed to her attorney, Mr. Heyman, not offered to impeach Miss O'Connor, and certainly incompetent to show the taxpayer's state of mind.

Mr. Crittenden: Mr. Heyman wasn't a witness. Mr. Bosserman was.

Mr. Marcussen: The issue is the state of mind of the taxpayer. I would like to have her take the stand.

The Court: Who is Mr. Heyman?

Mr. Crittenden: Counsel with me in this case.

The Court: Is this the last one in that case?

Mr. Crittenden: Yes.

The Court: On the basis of statement of counsel, and the purpose for which it is offered, I shall sustain the objection in this case, because I don't think that it would be competent testimony or evidence for the purpose stated, that I can see.

Now, if there was something that I don't know about [30] Mr. Bosserman and his testimony, presumably there might be some reason for it, but I don't find that this would be proof of the matter which has been presented to me, so I will rule it out, and the other documents which have been listed, and have been agreed to, that is, the documents which were offered at the other trial, but were not made a part of the record—how many papers are there, Mr. Clerk? I know two of them were blown-up checks.

The Clerk: I count ten, if your Honor please,

and then these two so-called blown-up checks. That seems to be 14.

Mr. Crittenden: That one you have here is one that was admitted to evidence.

The Court: That one is admitted.

The Clerk: Then 13, if your Honor please.

The Court: 13 are received and made exhibits in this case, that is our exhibits, and show that there are 13 documents in there, in that envelope, and are made Exhibit 6 in this proceeding.

Now, the other one which was in evidence goes with it as a part of Exhibit 5.

Mr. Crittenden: May I have this marked for identification?

The Court: Yes, this letter will be given identification No. 7, for the Petitioner. [31]

The Clerk: For identification.

The Court: Yes, for identification.

(The letter referred to was marked for identification as Petitioner's Exhibit No. 7.)

The Court: Now, what did we have of those original papers that you were tendering in support of your original motion? You had those marked?

Mr. Crittenden: Those were the first four.

The Court: Four papers marked for identification? We have 1, 2, 3, and 4 for identification, and now we have 7 and, as exhibits in evidence, we have 5 and 6.

The Clerk: Correct.

The Court: All right, you may proceed.

Mr. Crittenden: Your Honor, we have here the transcript of the testimony in the first trial to which

counsel referred. I want to point out to your Honor that these are my own copies, and they may be marked up with pencil on there. I have a bad habit of doing that, and I want your Honor to disregard any pencil marks and I understand that Mr. Marcussen has the Court copies and can compare them and see if they follow.

Mr. Marcussen: Subject to check for errors?

Mr. Crittenden: Now, this consists of Volumes 1, 2,—some of these are bound into two volumes. I will just count the numbers that are marked. [32]

Mr. Marcussen: Do I understand that you offer the entire transcript?

Mr. Crittenden: I am going to pick out parts. That is what we are doing, as I take it. I will want testimony of a couple of the witnesses here, and I will point them out to your Honor.

Any markers in here with papers I wish you would disregard them. There are eight volumes here, bound up.

The Court: How many separate?

Mr. Crittenden: Ten separate volumes.

The Court: Ten separate batches here? That is, bound separately, which are marked for eight volumes of testimony. Are they offered as they are?

Mr. Crittenden: I am offering them as they are, and I am going to draw upon them for the testimony of Mrs. Mattick, and I think Bell, and I think you will want the testimony of Tormey and Mrs. O'Connor.

Now, we don't intend to put your Honor to the trouble of reading any more than what is specified.

Mr. Marcussen: And Mr. W. M. Roche, and Mr. Richard Akeroyd.

The Court: Now, as I understand it, it is agreed that the testimony of those individuals named by counsel for Petitioner and counsel for the Respondent, given at the time of the trial are to be made a part of the record in this case, [33] for the purposes of this case?

Mr. Marcussen: That is right.

Mr. Crittenden: That is right.

The Court: Maybe we will have to make that a joint exhibit.

The Clerk: Joint Exhibit 8-A.

(The document referred to was marked and received in evidence as Joint Exhibit 8-A.)

[See pages 355-387.]

Mr. Crittenden: Now, your Honor, I have a transcript of a part of the trial, and it was sustained by the Court, that fraud was not an issue in that trial, and it was also followed by the second trial, the same instructions were taken without change for the second trial.

Mr. Marcussen: Now, if your Honor please, this constitutes nothing more or less than a difference between government counsel and the counsel for the defendant, in the criminal trial.

The Court: Which trial?

Mr. Marcussen: The second criminal trial.

Mr. Crittenden: Followed in the second trial.

Mr. Marcussen: Now, the instructions to the jury are in evidence. The nature of the criminal trial is

enclosed by the evidence which has been stipulated in this case, which includes the pleading.

Mr. Crittenden: I have no objection to using this [34] form in the certificate of the clerk, rather than calling the clerk.

Mr. Marcussen: Subject to check for any inaccuracies; I don't raise any question as to the authenticity.

Mr. Crittenden: You could call the reporter and ask his present recollection.

Mr. Marcussen: It is not our purpose to go to all that trouble.

Mr. Crittenden: I didn't want to be in the position of being sawed off.

The Court: Now, where are we on this, then? You are offering this in evidence? Is that what you mean?

Mr. Crittenden: As part of the proceedings of this case.

Mr. Marcussen: The Respondent objects.

The Court: What is the basis of your objection?

Mr. Marcussen: The objection is that it is immaterial and merely shows the difference that was argued out in the trial below, as to a proper instruction as to what is the element of intent under the charge in the indictment, and counsel wished to have an instruction which specifically used the word "fraud," and government counsel, as I have just read that, pointed out that the word was not used in the statute, but merely referred to willful intent to evade the tax due, words to that effect.

The Judge gave adequate instructions to the jury.

Mr. Crittenden: There was adjudication that fraud was not an issue in that case.

The Court: What was the issue in that case?

Mr. Crittenden: Section 145.

The Court: What was the issue?

Mr. Crittenden: I thought fraud was an issue, but I was fooled.

The Court: Well, what was it? I understand there was a conviction for felony.

Mr. Crittenden: Yes, for 1942.

The Court: Well, what was the conviction for?

Mr. Crittenden: 145 of the Code.

The Court: What do you say it was?

Mr. Crittenden: I thought fraud, but the Court ruled against me. I mean the adjudication of the Court was something besides fraud. I still don't think it is a law, but I lost on the appeal.

The Court: As far as that is concerned, I don't know that we need to waste a lot of time on it here. The objection to this is on the ground that it is immaterial, and since we, as so often stated, have no jury to protect, we are the court and the jury; we proceed to make the record, and do not normally sustain objections for immateriality unless it is an obvious encumbering of the record, an undue encumbrance. [36] The objection will be overruled, and the exhibit will be marked Exhibit 9 in evidence. Of course counsel can make whatever argument he wants to make on his brief. He will probably make it anyhow, and then when we get it, we will look at it and see if we think it has merit.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 9.)

Mr. Crittenden: Your Honor, I have my office copies, a copy sent to me by Mr. Nestell of requests for work sheets for him to work on and make a comparison for the purpose of this trial, and the work sheets were refused. You will stipulate to that, so I will show you what I did receive was this photostat, two pages, that is all I received, no supporting papers with that.

I am offering these to show the demand and that they were refused, my letter of June 20, and Mr. Nestell's letter of June 20—Mr. Nestell's letter of July 10, and the reply I received was forwarded to Mr. Nestell.

Mr. Marcussen: As to authenticity, I don't have the file in which this material would be contained, so I would want to reserve an opportunity to compare the letters with the letters I have in the file.

Secondly, I want to say that there is a procedure in the rules of this Court for a statement of position of either party, and that no such motion was filed, and this is too late [37] to do anything about the failure to supply work papers.

A request was made for the detailed working papers which are very, very voluminous, supporting certain statements which were supplied to counsel at his request. That statement was a statement of the computation of the increase in net worth of the Petitioner, and also an independent statement, set-

ting forth a detailed statement of the income and expense for each one of the taxable years.

She has that information and she has the books, all the detailed information. What she is asking for is the voluminous detailed account sheets of our auditor who audited these books.

Mr. Crittenden: Your Honor will see that I received these photostatic copies. The accountant had them before him, and he found it wasn't sufficient to prepare the necessary information for this Court. The reasons why the demand was made——

Mr. Marcussen: If your Honor please, counsel informed me yesterday that he couldn't get his accountant to make an audit in this case. It took our own accountant anywhere from three to six months to audit the accounts and ascertain the true income of this petitioner, and he desires to avail himself simply of all the details of the computations of the government, instead of making his own audit.

He has the burden of proof. It amounts here to an [38] improper request for detailed audit papers of the agent who made the investigation in this case. Now, Petitioner has the burden of proof in this matter.

Mr. Crittenden: I am not an accountant. I am just a lawyer. I go to skilled accountants and he said he needed other things to go ahead. I said I would make the request for them. He said he would and went ahead and made a request and came up against a blank wall.

You know that in the years since 1942, a lot of water has gone under the bridge, and to go out and

make independent verification at this time would be impossible. The accountant needs those things to work from, and without those, he tells me he is unable to do it. The reasons in my demand are shown there, and I think if I do not have the proof, it is not my fault, and I want to show that.

Mr. Marcussen: There is no impossibility to make an audit in this case. If the government can make the audit, then the taxpayer can make the audit. This amounts to nothing else but a request for detailed evidence that is in possession of the government and the method of calculation supporting the deficiency. There is a method by which counsel could have requested this, under the rulings of the Court, and this is not the time to make the request.

Mr. Crittenden: I made a request for certain things, and I want to show, your Honor, that the deficiency sets forth [39] round numbers as per attached schedule, and not having the attached schedule, I raise this point.

Mr. Marcussen: I will clarify that for you right now. The schedules referred to a deficiency notice and are not the schedules on the returns of the taxpayer. There were no schedules attached to the deficiency notice. Those designations of schedules are designations of schedules appearing on the return of the taxpayer.

Mr. Crittenden: It says, "Schedule B, increase in other expenses, increase in salaries and wages, increase in taxes and business."

Mr. Marcussen: That is in the notice as it ap-

appears attached to the Petition, if your Honor please.

The Court: Where are you reading this?

Mr. Crittenden: Page 3, on "Adjustment to net income for the year 1944." For instance, deductions, Schedule B, "Increase in other expenses, Schedule C, "Increase in salaries and wages," Schedule C, "Increase in taxes on business," Schedule C, "Increase on loss."

The Court: Well, I take it—I don't have the return before me, but I take it that Schedule F of the return is "Other expenses." Is that what it is?

Mr. Marcussen: That is correct, your Honor.

The Court: That is merely designating its classification for the purpose of making the return, as I understand [40] it?

Mr. Marcussen: Just by way of identification.

The Court: Just descriptive, is that all?

Mr. Crittenden: I don't see any attached schedule on there.

The Court: It is a reference to where it should be on the return.

Mr. Marcussen: That schedule B is on the back of the first page, if your Honor please, and it shows——

The Court: Is that the '44 return? Schedule B, Income from rents?

Well, now, these references to schedules B and C certainly merely are designations of the schedule where they are supposed to be reported on the return.

Mr. Crittenden: If that is so, I entirely misunderstood the letter.

The Court: That is what that is.

Mr. Crittenden: I understood it was the schedule attached. I looked and couldn't find it.

The Court: Now, as to statements with respect to Schedules F and G, those are references, those are identification items, your depreciation, your Schedule B, increase in other expenses, Schedule F, is a reference back, or rather a reference from B down to F for detail as to what it is, because F is the explanation for depreciation claimed in Schedules B [41] and C. Schedule G is an explanation of Columns 4 and 5.

So those are descriptive mainly to tie this in with the return as reported. Those are identification marks.

Mr. Crittenden: When I read a report and it says, "Per Schedule so and so," and then refers like for instance to Schedule C, Increase in loss; Schedule G, \$100, I look to the paper to see where the schedule is.

The Court: All of this is on the return. Those are adjustments made with respect to matters in certain categories on returns, and that appears to be what that is. That is a logical conclusion to draw, because all of these adjustments, and a statement attached of necessity, to be plain, would have to tie in to show that it is an adjustment of figures on the return. Well, the figures on the return fall in the various categories as required by the form,

that some of the items be broken down in the schedules of the return.

I don't think that that is necessary.

Mr. Crittenden: I only misunderstood it, your Honor, and I was laboring under that misapprehension, until it was explained.

The Court: I presume that that was part of the matter back of documents offered here.

Mr. Crittenden: I was given this. Then I was told that that was my details. The accountant tells me it is not enough for him to work with. Maybe he is not skilled [42] sufficiently.

Mr. Marcussen: He had the books that our accountant had.

Mr. Crittenden: He said it was not sufficient. You will notice Mr. Barlow's testimony to the same effect, that it wouldn't be sufficient.

The Court: Who is he?

Mr. Crittenden: He testified in the second trial.

The Court: Who is he?

Mr. Crittenden: A witness, a certified public accountant.

The Court: What was his participation?

Mr. Crittenden: A witness for the defense.

The Court: Called as an expert accountant, or something of that kind, to give opinion?

Mr. Marmussen: Simply to a computation of the tax that was introduced in a criminal trial by the government and made no reference to these sheets or anything that is being discussed at the present time. He made reference only——

The Court: It couldn't very well have been to these sheets.

Mr. Marcussen: They were not in evidence.

He merely testified that he wouldn't, in substance, be able to compute the tax unless, for example, he knew how much of the exemption, for example, had been taken by the [43] husband of the Petitioner, and also stated that he would not be able to compute the tax unless he had an accurate ascertainment of the earned income, in order to compute the earned income.

Mr. Crittenden: He also testified what was necessary in an audit.

The Court: Now, as I understand it, we have here copy of a letter by Mr. Crittenden, under date of June 20, 1950, enclosing a copy of a letter he received from Mr. Nestell, of the same date, asking for work sheets of the government, although that letter is rather general, and I would not necessarily know just what Mr. Nestell wanted.

Now, while it is not here, I presume from the second letter, dated July 10, a copy of which I have here, to the technical staff from Mr. Crittenden, enclosing a copy of a letter received by him from Mr. Nestell, dated July 7, which indicates that certain schedules were received, but Mr. Nestell wanted something further, and now do I understand that these four copies of letters, the ones I have mentioned, and these two photostatic schedules are the sum total of the matters that you are now offering here?

Mr. Crittenden: That is right, and I also stipulate that I didn't receive what I asked for.

The Court: The truth is, I rather think that you did. These schedules are pretty full and quite descriptive. [44]

Mr. Crittenden: I had those before I wrote the letter.

The Court: Well, then, I think they are pretty full and complete, for the purposes here, and they state the determination, the categories, the character of the items, the allowances made and everything in there quite in detail, and certainly it would give an accountant the necessary leads for his verification of these matters from records in working up an analysis or a calendar statement.

So I will mark the four copies of letters, and the document that was supplied in evidence as Petitioner's Exhibit 10.

(The documents referred to were marked and received in evidence as Petitioner's Exhibit No. 10.)

The Court: Now, I would say that certainly with that detail and, of course, you say you had it before, well, from that detail, then, if there were matters that weren't clear to this accountant on it, and that he couldn't verify from records of this Petitioner, then certainly his request made was not of such character as evidenced by those sheets, to indicate any proper request for anything beyond that, because it is just broad and general, and now it appears to me that he should have given you something more to go on than your course was then on

the basis of specified deficiencies, to file your proper motion before going to trial on this case; [45] for further and better statement, if there was anything that couldn't be worked out, but at any rate, to show what actually transpired. Those matters are admitted in evidence and marked Petitioner's Exhibit 10.

(Discussion off the record.)

Mr. Marcussen: Counsel and I have discussed certain documents and if counsel has no objection, as he has stated he hasn't, I would like to offer in evidence the certified copies of bonds, purchased by the Petitioner in the year 1943, and I believe all of them were purchased in that year. They are material only to show the funds at her disposal during that year, and they tie into the net worth statement which has already been submitted to counsel, and which the government will introduce into evidence in support of the deficiency judgment.

The Court: Is there any objection?

Mr. Crittenden: No objection. I don't want to limit the purpose. I want the Court to consider them for whatever he wants to.

The Court: They will go in for whatever they show is material and relevant.

That will be Exhibit B in evidence.

(The documents referred to were marked and received in evidence as Respondent's Exhibit B.)

Mr. Marcussen: That is all at this time. [46]

* * * * *

CATHERINE O'CONNOR

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crittenden): Where do you reside, Mrs. O'Connor?

A. I reside at 533 Valencia Street.

Q. And you are the Petitioner in this case?

A. Yes, sir.

Q. Now, when did you sell that Baker Street apartment?

These is no use, your Honor, in going back to all [69] the questions that were covered on the testimony in these trials before your Honor, so I am not going to repeat that matter.

The Court: You are making your case. So you go ahead and, if I have any difficulty following you, I will so state and we will meet the questions as we come to them.

Q. (By Mr. Crittenden): When did you sell that Baker Street apartment?

A. I think it was—I am not quite sure—but I think in the fall of 1945.

Q. And at that time, did you give up the apartment that you and your sister used there?

A. Yes, I had to give it all up, yes, sir.

Q. I notice on the statement here, on the net worth statement, there was some money for a hot water heater.

The Court: It is Exhibit 10, I believe.

(Testimony of Catherine O'Connor.)

Q. (By Mr. Crittenden): I see there is a water heater. Did you have water heater trouble?

A. Yes, it seems like when I bought the building there was an appliance or something belonging to the water heater that I didn't know about, like the PG & E owning the meters and things and anyway, after I took the place, they came and got this something, whatever it was, and it incapacitated the water heater, causing me to have to install a new water heater [70] for the apartment house.

Q. That was soon after you purchased it?

A. I believe so. I wouldn't be quite sure. It may be within three or four months, it might have been earlier.

Q. Now, you cashed in all your war bonds at the time you purchased the Baker Street property?

A. Yes, I wanted to explain, if I might, about some of those war bonds.

The Court: He will ask the questions.

Q. (By Mr. Crittenden): I just wanted to know about those. A. Yes, I turned——

Q. Here are two \$1,000 bonds, one purchased in April and one in May, 1943; and two more in August of 1943.

A. Yes. I turned these in on the property to Mr. Heyman. I bought the apartment house from Mr. Heyman, my attorney, and these were down payment.

Q. Now, those were cashed in at the time, as part of the transaction? A. Yes, sir.

(Testimony of Catherine O'Connor.)

Q. I understand two of them had to be held for a while before Mr. Heyman got his money?

A. That is right.

Q. Now, at the time Vic Divers sold out this business to you, what did the inventory consist of? [71]

The Court: The liquor store?

Q. (By Mr. Crittenden): It was a bar that you had down there? A. Yes.

Q. And Vic Divers was your partner?

A. That is right.

Q. You had bought a half-interest before 1942?

A. That is right.

Q. You bought the other half in July 1942?

A. Yes, I bought half-interest in 1940 with Mr. Gragan and then I bought Mr. Divers out in 1942. He bought Mr. Gragan out in 1941.

Q. What did that inventory consist of at the time you bought him out?

A. It wasn't very much, Mr. Crittenden, due to the fact that the liquor that we were just talking about had been stolen December 10, 1941, when they broke in and took a lot of it.

Q. Did you have a breaking-in in 1942?

A. No, sir, in 1941, December 10, 1941, when Mr. Divers was my partner.

Q. You had carried a very minimum supply, I take it?

A. Yes, it was hard to get anything anyway. It was hard to get liquor of any kind and stuff that I did have on hand was stolen. [72]

(Testimony of Catherine O'Connor.)

Q. Thereafter you only kept broken bottles?

A. What we could get, putting in rum and all that stuff to be able to buy a few bottles.

Q. Now, at the end of 1944 you had inventory, did you? A. Yes, sir, I did.

Q. Now, when you bought whisky or merchantable liquor during that time, in what manner did you buy it?

A. That is what I was just telling you. I would have to buy maybe——

Mr. Marcussen: I object. That was thoroughly covered in testimony in the previous trial and has no materiality here.

The Court: Now, she is being questioned on the issues and you may proceed.

Q. (By Mr. Crittenden): What did it consist of?

A. Just four or maybe six bottles, or maybe nine or sometimes, if we were lucky to get a case, I would have to buy maybe five or seven or sometimes ten cases of tequilla and rum and—not cordials, but mixes like Manhattans or cocktail stuff. They are still standing down there.

The Court: When was this you are speaking of?

The Witness: You are asking me?

By Mr. Crittenden: 1944? A. Yes. [73]

Q. Now, in 1944, did you have a lot of these types of rum and tequilla and cocktail mixes?

A. I still do.

Q. That was your principal stock at that time, was it?

A. Yes, sir, I used to have to run around, even

(Testimony of Catherine O'Connor.)

bring in beer and stuff, a case or two at a time. It was hard to get.

Q. And the inventory—there was an inventory prepared early in this case? Do you remember when Mr. Heyman and you went to the Intelligence Unit's office?

A. I was too confused down there with all of them saying this and that to me, that I may have said yes when I should have said no. I don't know what really did take place down there.

Q. And your inventory at the end of 1944 consisted, for the most part, of these things that you got on deals? A. That is right.

Q. Now, was there a market for those? Could you sell them to anybody at that time?

A. No, I still have it. I had to discount a lot of it since I moved into my new place and had to sell at a loss. I have got it all down in my books.

Q. You moved early in 1945 to the new place?

A. In the fall of 1945, September of 1945.

Q. Now, when you moved and you sold this place, can you tell the Court how much you received for some of those things you had in the inventory?

Mr. Marcussen: May we have that identified as to what he means?

(Question read.)

Mr. Marcussen: I object to that as assuming a fact not in evidence. The evidence will show that we are talking about the inventory at the end of 1945—I beg your pardon, 1944—and the sale of that material, after the taxable year, has no materiality

(Testimony of Catherine O'Connor.)

on the issues in the case, and it assumes that she has testified here that she sold those during the taxable year. She has testified to no such thing.

Mr. Crittenden: I am taking the position that inventory should properly be written off at its true value. At least at that time there was an actual market for the cats and dogs that people in the liquor business had to take, and I want to show what kind of prices and what the market was for that type of merchandise.

The Court: Let's get back to the question.

By Mr. Crittenden: I will reframe the question. Did you have any inquiries to buy any cats and dogs at or about the end of 1944? Did any dealers, any of the salesmen, come in and offer to buy, tell you the market price?

A. But such a terrific loss. I sold some, but some that I thought that I could sell on the bar, I kept.

The Court: For what?

The Witness: Various liquor companies. I don't remember.

The Court: That you were dealing with?

The Witness: Yes, sir.

Q. (By Mr. Crittenden): Now, you say a great loss. What do you mean by a great loss, for instance?

A. I mean I would have had to take about a third or a fourth of the true value.

Q. You mean the wholesale cost?

A. Yes, sir.

(Testimony of Catherine O'Connor.)

Q. Now, when you get into the wines, how about that?

A. It was the same way. The cordials had turned to sugar and some of the other stuff had become cloudy. I couldn't sell it.

Q. I see in 1942, you are charged with a piano. You had a piano at that time?

A. In 1941 we bought a little small piano for the club, a little Ivers-Pond.

Q. I see a price of \$66.95.

A. And then we turned that in.

Q. Is that the one for \$66.95?

A. No, we turned in the little Ivers-Pond for the Kimball Baby Grand that I used in the club, and I am still [76] using.

Q. When did you get the Kimball?

A. I got it in 1942, I believe. I wouldn't be sure, but I am sure I had it—or the early part of 1943. I am not sure. Maybe it was earlier. I am really not sure on that, your Honor, so I hesitate.

Q. That was used in the business?

A. Yes, sir, it is.

Q. Did you have any gambling transactions in the years 1942, 1943, and 1944?

A. Not in '42 or not in half of '43, when I was married to Mr. Jost.

Q. Did you shake over the bar?

A. Oh, yes. I thought you meant playing cards. Oh, yes, we all shake over the bar out there in the Mission, for drinks, double or nothing, yes.

(Testimony of Catherine O'Connor.)

Q. And when you make double, the customer pays twice as much? A. And it is rung up.

Q. When you lose, he just gets the drink?

A. The stock goes out, yes.

Q. Now, you go through here, through these books, and pick out the gambling losses that you had.

A. This is starting from July, 1942.

Q. Do you have entries in that year? [77]

A. I had no gambling then. I was married to Bill—outside of just on the bar for drinks. However, your Honor, I did do this. I didn't know how to put my losses down. Well, I will tell you what—we did gamble on the bar for money. I mean, just between the tavern owners and themselves, and I didn't know how to put it down and I will admit to you that I put it in, anything that I could think of, Red Cross, any donations that I could think of. I never thought of anything wrong; in fact, I never thought there was ever going to be any trouble, but I didn't know how to put it down for my book-keeper, and I just put in anything.

The Court: You mean the amount you lost?

The Witness: Yes.

Q. (By Mr. Crittenden): Now, the expense here in August, 1942, Red Cross, \$37.50?

A. Yes, that is a gambling loss.

Mr. Marcussen: Let the records show that she is referring to the righthand side, the righthand page under August of 1942, the first column.

The Witness: I do say that on the bar only.

(Testimony of Catherine O'Connor.)

This wasn't cards, because I didn't start playing cards until after Mr. Jost and I was divorced, but I say on the bar, the tavern owners, we would gamble for drinks and money. [78]

Q. (By Mr. Crittenden): Are there any other items on that page?

A. No, this Morris Plan, that was a payment to the Morris Plan.

Q. I ask you on the next page if you see an item there.

A. No, this was Morris Plan.

Q. Under "Donations"?

A. One bill I got, insurance, \$34.50, fire insurance. Now, on November 19, 1942, I put "USO, \$50," and that was a gambling loss. This was all for the Morris Plan.

Mr. Marcussen: If you Honor please, may I request that the witness be instructed not to refer to items that are not gambling losses?

Now, that last statement was, "This is something about the Morris Plan." I think it would help matters considerably if she talked about the items counsel asked for for the record.

The Court: When you find one that is within the range of the question, why, then, speak, but the others——

The Witness: In December of 1942 I got Red Cross, \$15 and USO, \$65. That was the same.

Q. (By Mr. Crittenden): Were those gambling losses?

(Testimony of Catherine O'Connor.)

A. Yes, sir. And again April, 1943 I have got USO \$65.

Q. Is it a gambling loss? [79]

A. Yes, sir. I got \$200 here, your Honor, in June of 1943. I got Liberty Loan. Now, whether I was buying a bond at that time and applying on one of these loans, I can't say for sure.

Q. But you think it was a gambling loss? Do you know?

A. I can't say for sure. It may have been applying on one of those. If it wasn't, it was a gambling loss. Again, in September, 1943, the amount of \$224, gambling losses.

The Court: How was that entered?

The Witness: Entered as "Donations, Red Cross." And then, your Honor, in October, 1943, I got "Last payment to Lachman, \$750." That was a gambling loss. I didn't want to show it in the books, all those losses. I didn't know gambling was taxable.

Q. (By Mr. Crittenden): We will go into that later on.

A. November, 1943, Mr. Mooney, \$29.90.

Q. That was a gambling loss? A. Yes.

Q. I have another one here, Tom Mooney, October, 1943, \$20.

The Court: That just shows the name of the man?

The Witness: The man I owed the money to, yes, sir, and then I am going back. I didn't read it to you. In September, 1943, \$45 to Mr. Mooney.

(Testimony of Catherine O'Connor.)

The Court: That is all the explanation on the books, is just——

Q. (By Mr. Crittenden): Just says "Paid to Mooney."

A. December of 1943 to Mooney, \$55; and again in January of 1944, \$25 to Tom Mooney. March, 1944, \$65 to Mooney.

Q. A gambling loss?

A. Yes, all of these I am reading are.

Mr. Marcussen: How was that designated in the book? May the record show that?

The Witness: Tom Mooney. I have got it written in there, loss gambling.

Tom Mooney, \$40 in April 1944, and \$80 in April of 1944. I got loss to Louie and I loaned one of the boys for gambling that I never got back, \$90 in May of 1944.

Q. Did you share in the gambling?

A. I would have, had he won, but he lost and never returned it. Again in November of 1944, I have got \$75 marked for the poor, for donations.

The Court: Donations?

The Witness: Yes. And also Red Cross, \$150, the same year.

Q. (By Mr. Crittenden): Was that a donation or was that gambling? [81]

A. A gambling loss and also in December of 1944, donation.

Q. How much?

A. \$125 and \$150. They are both gambling losses, yes.

(Testimony of Catherine O'Connor.)

The Court: That is the end of 1944, all right.

I think we had better have lunch, but before we do, just while it is fresh on my mind, what sort of gambling was this? Dice?

The Witness: No, we used to play cards, your Honor.

The Court: And Mooney was a participant?

The Witness: Well, yes, various ones around there. All the tavern owners, he was really the one that would let us have money, and he would loan it, you know. He had a little club over there, the Charter Club.

The Court: I was just a little curious about how it was that he appeared to be, from your losses there, a winner. He was putting up the money and you were helping him out?

The Witness: No, it was a little club that he had. We played legal and legitimate. It is called straight draw.

The Court: You were going to his place?

The Witness: Yes. [82]

* * * * *

W. M. ROCHE

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Marcussen): What is your business, Mr. Roche?

(Testimony of W. M. Roche.)

A. Installment Department of Lachman Bros. Furniture Company.

Q. Have you brought with you the account of Catherine O'Connor, Catherine Jost, or Catherine Larsen? She may be known by either one of those names or several of them? A. Yes.

Q. What is the business of Lachman Bros.?

A. Retail furniture and appliances.

Q. Are these the original ledger cards of her account and the business that you have produced here? A. They are, yes.

Q. And I notice that you have—is that a summary of the information that appears on those cards?

A. This is a summary by the year. [88]

Q. Did you prepare that? A. Yes.

Q. From those cards? A. Right.

* * * * *

Mr. Crittenden: Could I ask what the purpose of this is?

Mr. Marcussen: The purpose is to show the purchases at Lachman Bros. I think deductions were claimed by the taxpayer in this record for those purchases, to establish the amount, and also for the purpose of showing that, in fact, when she testified that a certain check in this book was to Lachman Bros., there was no balance of \$750 due at Lachman Bros.

Mr. Crittenden: I think she testified that was gambling.

(Testimony of W. M. Roche.)

Mr. Marcussen: I think that merely establishes it, then. [89]

* * * * *

Mr. Marcussen: I would like to offer them as Respondent's exhibit, the ledger cards, all as one exhibit.

The Clerk: That is Exhibit 11.

Mr. Marcussen: And then the summary statement which the witness testified to as Exhibit 12.

* * * * *

Cross Examination

Q. (By Mr. Crittenden): Mr. Roche, Mr. Nestell called you in May of this [94] year, inquiring as to the amount of the account of Mrs. Larsen, or Mrs. Jost?

A. I don't recall any party calling me. I wouldn't say that she didn't call. She might have called somebody in our office. We have quite a number of people in the office, and he may have called one of the bookkeepers.

Q. Do you have custody of those accounts?

A. Supervision of the accounts.

Q. And if any inquiry came in, it would be to you, wouldn't it?

A. Not necessarily. A lot of people work there, and I might be on vacation or ill or out to lunch, somewhere else.

Q. You know that Mr. Nestell did make an inquiry and was told you didn't have these?

A. Not to my knowledge.

Q. Nobody came to you and told you anything?

(Testimony of W. M. Roche.)

A. Not that I know of.

Q. If such an inquiry came in, would it have been presented to you?

A. I am not saying that it wasn't presented. In the course of six months, we handle a big volume of business. I couldn't state it being brought to my attention, but I don't recall. [95]

* * * * *

CATHERINE O'CONNOR

called as a witness for and on behalf of the Petitioner, resumed the stand, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Crittenden): Mrs. O'Connor, when we called a recess we were talking about gambling winnings and losses, referring to the year 1942. Did you shake for drinks over the bar?

A. Yes, sir.

Q. Did you shake for money?

A. Yes, sir.

Q. Can you tell me—or do you have any record as to how much you made or lost on the shaking for money alone, not for drinks?

A. Out in our location, among the people who are in business, it is not only customary, it is necessary in order to hold trade to shake for drinks; otherwise they go to some place that will, and during those years especially there were those who would come into the place and not only shake for

(Testimony of Catherine O'Connor.)

drinks, but the tavern owners, particularly, would shake for money among themselves.

Q. Now, as to money, do you have any record as to the amount you won or lost, or both, during the year 1942, at that tavern, over the bar, not for drinks, but for money? [96]

A. I have been very lucky. Not knowing anything about dice or anything, I was very lucky at shaking for drinks or money, and I will say that my gambling losses were quite a bit, but my gambling winnings were even more, and I didn't know what to do with them. I didn't have any knowledge that they were taxable, and so I just put all my winnings in the bank.

Q. You deposited them in your checking account?

A. Yes, sir, the only one I have.

Q. The Bank of California? A. Yes.

Q. Now, in 1942, did you keep any record of them?

A. No, sir, I didn't know they were taxable. I had no idea.

Q. Now, when you shook for——

The Court: In other words, you didn't enter them on your books, your winnings?

The Witness: No, sir, I didn't. I put it in the bank.

Q. (By Mr. Crittenden): Now, as to the double or nothing, when you shook for drinks, what did you do with the winnings on that?

(Testimony of Catherine O'Connor.)

A. I always rang that up, because if I lost, then I would have to pour the drinks free.

The Court: You would ring up the double as a single? [97]

The Witness: Yes, sir.

Q. (By Mr. Crittenden): And if you lost, you wouldn't ring up anything, would you?

A. No, I would have to buy the drinks.

Q. Now, during 1942, 1943, and 1944, what amount of your sales was done by this double or nothing? Do you know?

A. Oh, I would say perhaps—you mean shaking for drinks?

Q. That is right.

A. Well, I couldn't say exactly, but it would be anyway a fourth, maybe up to a half, because, as I tell you, anyone, you shake for drinks, or you don't get trade. That is all.

Q. And that would be reflected in your machine totals, wouldn't it?

A. Yes, sir.

Q. Now, I am referring to this black book, under the column of receipts, that is, January, 1944, there are a number of columns on the left. What does that represent?

A. The actual sales taken in.

Q. That is your adding machine total, is it?

A. That is the money that went through the register, of my receipts, my day's receipts.

Q. You had other receipts, didn't you, during that period of time? [98]

A. I had pinball and claw machines and music

(Testimony of Catherine O'Connor.)

boxes, your Honor. That wasn't never entered. Mr. Bosserman didn't even tell me that those things had to be entered.

Q. What did you do with that money?

A. I deposited it.

Q. In the bank? A. Yes, sir.

Q. But you didn't enter it in your adding machine or cash register totals?

A. I had no idea about it. I paid license on it and if there had been any thought come to my mind, it would have been that they were clear, because the licenses were paid on them.

Q. After you left your husband in the middle of 1943, did you have any gambling winnings?

A. Yes, I did. I won quite a lot.

Q. And in 1944, did you have any gambling winnings?

A. Yes, we used to play cards at this little club, my customers and my sister and myself. We would go down to a little place in Colma and we would gamble down there, business associates of mine and myself.

Q. Did you win or lose in that gambling?

A. I would lose sometimes, but my winnings always exceeded my losses. One time I won \$1,750 playing baccarat.

Q. What did you do with that? [99]

A. Paid \$1500 to Mr. Heyman, of the \$1750, on the apartment house.

Q. How about some of these bonds that are in evidence?

(Testimony of Catherine O'Connor.)

A. And the same with the bonds. The money I would win from shaking over the bar I would pay toward buying myself those bonds. That was in 1942 and 1943 I bought those bonds.

Q. I think all the bonds are in 1943.

A. I think I bought a couple in the latter part of 1942.

Q. Now, during this entire time, how often did you come down to the bar?

A. I was there practically all the time, only when Mr. Jost and I were married, he was there all day long and he would open up in the morning, any time he wanted, and he had access to the money and to the stock, and then the bartender would come on about noon and work until about eight o'clock, and then he and I together would take it at night.

Q. This was at night when you would do the shaking of the dice?

A. Yes, I was there every night. It was only at night that those things would come up. If the bartender shook during the day, or my husband, I don't know about that. I am just talking for myself.

Q. You waited on customers yourself?

A. Yes, sir. [100]

Q. Virtually every evening?

A. Every night, I have always been there, and then after Mr. Jost and I split up, I was there more than ever then, because I didn't have to keep house.

Q. Now, in 1943, it was in February or March

(Testimony of Catherine O'Connor.)

that you gave Mr. Bosserman the job of making up the first return, wasn't it?

A. Yes, it was for the income taxes for 1942, yes.

Q. Did you tell him what experience you had had with income taxes before?

A. He knew I didn't know anything. I don't know how I ever happened to get him, but anyway, he was sent to me or brought to me or something, and he told me that he was with the government for so many years, and he had had experience, and I didn't know the difference between a bookkeeper and a CPA, and I thought the man knew what he was doing.

He told under oath up there that he didn't even know I had a bank account when I paid him by check and every check and every book and everything was taken over to him.

Q. And he made out the returns for you?

A. Yes, he did.

Q. Did you provide him with all the books and records? A. Yes, I did.

Q. And then you——

Mr. Marcussen: What books? May they be identified? [101]

Mr. Crittenden: 1942.

Q. (By Mr. Crittenden): I am going to show you these two books and ask you if these are the books that you gave him.

A. Now, this gray book was a partnership book that we had up to the day that I bought Mr. Diver's share. That was July 15 of 1942 and my husband

(Testimony of Catherine O'Connor.)

Bill, Mr. Jost, advised me to open up another book entirely, and this was given to Mr. Bosserman, by whom I don't know. I couldn't tell you, your Honor, but I never seen this book with all this blurred stuff that was supposed to be mine. This is a book that I opened.

Q. The black one, you mean?

Mr. Marcussen: She never saw the gray book, is her testimony.

The Witness: Didn't see the gray book after the partnership, either Bosserman took it from someone else or how he got it I don't know.

Q. (By Mr. Crittenden): Now, referring to the checks, each month that you would get your statement—after you checked it over what would you do with it?

A. I would send it over to him.

Q. Did you put it in a bag, or keep it in anything?

A. During the first part, up until about July of 1944, I had a little register that only rung up to \$3.00, no tapes [102] or anything on the thing, and so necessarily there was no tape saved, no thought of saving it, and then after the other register was installed, I used to put the pay-outs and the tapes and whatever I had for him to bring up the papers at the end of the month, along with the bank statement, and then my sister, Mrs. Mattick—it is too bad she isn't here.

Q. We have her testimony in the record.

A. And she would take them over to Mr. Bos-

(Testimony of Catherine O'Connor.)

serman every month, either that or he would come and pick them up.

Q. You put these in a bag?

A. Everything that went on the bar, along with the day's receipts, along with the pay-outs, along with everything.

Q. And that was delivered to Mr. Bosserman for making the account for the first year of 1942?

The Court: When would you deliver this to him?

The Witness: You see, the sales tax is made up by the month, your Honor.

The Court: You delivered this to him by the month?

The Witness: Yes, sir.

Q. (By Mr. Crittenden): But you first employed him in the spring of 1943, to make up your income tax return? A. Yes.

Q. Did you give him the books at that time?

A. He had everything. [103]

Q. Did he come to your place of business?

A. That is when he came first himself and picked up everything. Mr. Jost can verify that.

Q. Did you tell him he was to make up the return for you?

A. That is why I employed him.

Q. And he brought you the return?

A. Brought it down himself, and Mr. Jost and I both signed it.

Q. Did he ever tell you it wasn't proper, or didn't have all the income?

A. He never told me a thing, gambling losses or

(Testimony of Catherine O'Connor.)

winnings or pinballs or claw machines—he used to have to fall over them to get to the back room. The place was only 25 feet wide.

Mr. Marcussen: May her testimony be in response to questions?

Mr. Crittenden: Well, I am trying to bring these things out.

Q. (By Mr. Crittenden): Mrs. O'Connor, when Mr. Bosserman came to you, did he ask for any other records than the ones you gave him?

A. He asked me for all records to bring up an income tax report and I gave him everything I had.

Q. And he did that for each of the years? [104]

A. And he worked right straight on with me up until the time of my indictment in 1947.

Q. Now, after 1944, was there anything after the return was filed, did he ever say anything to you about the gambling?

A. He never said a thing to me until I moved into my new club in September 1945. Then he came down one night and he was drinking and he called me up there alone to sit down and talk, and he said I might be getting in a little jam with the government, and I said why, and he said on account of the extra monies, and I said, "What extra money?" And he said, "Why, your pinballs and stuff," and I said, "You never told me they were taxable," and he said, "You ought to know that." And I said, "I didn't know it and you never said anything about it." And he said, "These gambling winnings," and I was surprised to hear that gamb-

(Testimony of Catherine O'Connor.)

ling winnings were taxable, and then he went on to enlarge.

Q. But that was not until after——

A. After September of 1945 when I got in the new club.

Q. Did he suggest anything about amended returns?

A. No, sir. Mr. Heyman wanted to make amended returns when we went in the office at first, when they first brought us in Mr. Heyman offered to make amended returns.

Q. When was that?

A. When the investigation first started. [105]

Q. You mean the time you went to the Intelligence Service?

A. Yes, that is what I mean.

Q. Now, there was testimony here about 13 cases of whisky.

A. He had access to the whisky and the register and everything, and there was no such a duplication of me marking up duplication of the 13 cases of whisky.

Q. He took whisky whenever he wanted?

A. You get he did, and lots of it.

Q. It was just at the time of the separation that the 13 cases came up?

A. That was when I discovered—that is when we had trouble over that, yes, and there were those—he said there was a lot of talk on the street. That is certain. There still is, but this party came and told me and he heard——

(Testimony of Catherine O'Connor.)

Mr. Marcussen: I object.

Q. (By Mr. Crittenden): You heard that your husband had taken it? That is when the family fight started?

A. Yes, and he sold it for \$2,000.

Q. Now, did you have any theft losses?

A. Yes, when Mr. Divers bought——

Q. I am not talking about 1941. I am saying in 1942, did the bartenders ever take any liquor? [106]

A. Like all bartenders do. You know, I mean, whether they take the money out of the till or whether they pour free drinks, it amounts to the same. It is all money.

Q. And you had that during the entire time?

A. And Shannon who got up and testified and lied.

Q. His testimony——

A. He drank a fifth of whisky every day before he could even get started.

Q. One thing I didn't go back to——

Did you rely on Mr. Bosserman's amount of return? A. Yes, I did.

Q. Did you ever total the amount of money you had? A. No.

Q. Did you total expenses? A. No.

Q. You relied entirely on him?

A. I had never paid an income tax before, because I never made enough.

Q. Referring to this black book, did you ever run any columns, or add up any amount in here? For instance, July?

(Testimony of Catherine O'Connor.)

The Court: What year?

Q. (By Mr. Crittenden): 1943.

A. You mean to total these here like this? Why, yes, I totalled these, but he went over them. Mr. Bosserman had [107] the book and he went over them. He didn't tell me they weren't right. I would add them all up.

Q. Did you make any balance sheet on those?

A. No, sir.

Q. You never set up a profit and loss?

A. I didn't know nothing about that, just totalled the sheet up and gave him the book at the end of the month.

Q. For instance, April, 1943, I see some numbers. A. This is all here, his here.

Q. He didn't total those? A. No.

Q. We are referring to all receipts.

A. This is all the receipts I totalled.

The Court: The day's receipts?

The Witness: Yes, sir, the rest of this I didn't do any of this.

Q. (By Mr. Crittenden): You didn't run the other totals here? A. No, I didn't.

Q. All you know is that you had bills to pay and how much money you had to pay them?

A. Every bit of money I would get in, I would put in the bank, no matter if it was gambling, if I was lucky enough to win, or if it was the pinball or the claw machine or the music box, they never even gave me a slip for it in those days, [108] not even the music. I didn't even get a slip.

(Testimony of Catherine O'Connor.)

The Court: Who do we mean?

The Witness: I mean the owner of the music box.

Q. (By Mr. Crittenden): How did you put in the music box, on what basis?

A. 50-50. No, I take that back, it was 60-40. They got 60 and I got 40. I bought records and service.

Q. They opened the box? A. Yes.

Q. And would give you whatever was the amount? A. Yes.

Q. And the claw machine and the pinball machine? A. 50-50.

The Court: Were you there when these machines were opened?

The Witness: Not always.

Q. (By Mr. Crittenden): How would you know what the receipts were?

A. I wouldn't know. Either my husband or the bartender, and they would tell me what was left there for me.

Q. And you put that directly——

A. In the bank, yes.

Q. Now, there was some rental income on property. What did you do with your rents?

A. Those rentals didn't amount to anything. There were [109] two apartments.

Q. Let's find out what you did with the money.

A. I deposited in the bank \$20 a month was all it was.

(Testimony of Catherine O'Connor.)

Q. Now, during this time, what did you do for living expenses?

A. Well, I would take it out of the business there, I mean, I would take it out of the receipts of the money. I mean I never kept track individually of what we were spending, because we were working all the time.

Q. Did you write down your personal expenditures in your book?

A. Some I would and some I wouldn't, and I would cook upstairs and bring it down and maybe serve it on the bar, make sandwiches, or, I am always giving little parties there to bring in trade.

Q. Did you do entertainment during that time?

A. Always at Christmas time, and I still do, a little Santa Claus and a gift for everybody.

Q. How about entertainment at the apartment that your sister had?

A. The only time I ever got to go over to the apartment house was after I would get through at night. I would take a bunch over and we would sit and play cards and I would cook up a big dinner. It was business. Just for business.

Q. How could you get business out there? [110]

A. Just by being a good fellow and by throwing a little party once in a while, just being a fine person, that is all.

Q. Did you ever buy gifts for people?

A. If it was their birthday, I still do, or a wedding party or something like that, I would have a cake made. I still do.

(Testimony of Catherine O'Connor.)

Q. How about gifts for birthdays?

A. The same way. I would give them pairs of stockings or something. It was all for business—I mean it was a continual thing, because I was trying to build up a trade.

Q. Did it have the effect of building up the trade?

A. Yes, I still have the same customers, yes.

Q. Now, when Vic Divers left, did he take any of the business with him?

A. Yes, some he took.

Q. Did you keep about the same volume of business, or more?

A. No, more. I had my own customers.

Q. Your own customers stayed with you?

A. Yes, you bet.

Q. Then you kept bringing in more customers?

A. One will tell another, yes.

Q. And your friends bringing in their friends? Lodge?

A. That is right, I belong to the Moose Lodge, and the Ladies Auxiliary come in there. [111]

Mr. Crittenden: That is all.

Cross Examination

Q. (By Mr. Marcussen): Now, you say it is your testimony that you didn't see this book after July 15, 1942?

A. No, I didn't. My husband told me to open up another account, and I did. You have shown me that before.

(Testimony of Catherine O'Connor.)

Q. Let me finish my question. I show you Pages 12 and 13 of the book, and it shows certain entries here for expenses. A. Yes, sir.

Q. And I ask you whether you entered those in there?

A. My husband and I both did.

Q. Does your handwriting appear there?

A. This is my handwriting here, \$76, but Mr. Crittenden, it wasn't as of a certain date. We would just enter them in the book any place, just like I entered them in the book.

Q. What were those expenses for? Now, before we go on to that, please tell me what else is in your writing there.

A. These are all my writing, sir, \$22.50. I got expenses. I don't say what it is. It is for \$17.50, and then I got \$30, turkey, telephone, present to a girl on the bar there named Ethel. It was her birthday and I gave a party and cooked a turkey. I got rent \$30, gas and lights, \$2.50. I got drinks.

Q. How about that extended \$3.50? [112]

A. \$3.50, hamburgers, and \$2.50, ball game. No, that is Bill's writing.

Q. You say that is your husband's writing?

A. Yes.

Q. And that writing?

A. This is mine, right here, but that is not mine.

Q. Now, just a moment. On Page 13, the \$3.50, that is your writing? A. Yes.

Q. And the item extended to the right of that, \$2.50, ball game. That is not your writing?

(Testimony of Catherine O'Connor.)

A. No, that is my husband's writing.

Q. Now, please go back to the next line on Page 12.

A. \$5.00 for groceries.

Q. That is yours, is it?

A. Yes, sir. Then cleaning house, \$1. I gave somebody \$1 for cleaning house, and then this is my husband's writing.

Q. Groceries, \$2.75?

A. Yes, sir. This is his writing.

Q. I will ask you the questions, so this may be identified for the record.

The next line—I will ask you——

A. Cab and drink. Evidently I paid somebody's cab fare.

Q. What is the amount shown there?

A. \$1.50. [113]

Q. And then on the next line and extended over to Page 13?

A. That is my husband's.

Q. A pencil entry.

A. \$4.30 for groceries.

Q. The next line, Page 12.

A. That is mine, jewelry, \$6.

Q. The next line, Page 13?

A. My husband, eats and drinks, \$6.

Q. Now, I call your attention to the fact that those entries on Page 12 are listed opposite dates 1, 2, 3, 4, 5, 6, 7, and 8 of August.

A. I didn't make these, Mr. Marcussen.

The Court: Didn't make what?

The Witness: Any of these on this side, no, sir.

(Testimony of Catherine O'Connor.)

Mr. Marcussen: And why were these put in here?

A. Like I told you in the back, or further back, you can see we just made a notation, both Bill and I, not as of any date, when it was occurring, just for our own record, of what we were taking.

Q. (By Mr. Marcussen): Hasn't this book been prepared by the month for each two pages?

A. This ended here, Mr. Marcussen, and this here.

Q. What ended where? Now, you are referring to Page 10? [114]

A. Yes, July when I bought Mr. Divers out.

The Court: Now, you are referring to what? What ended?

The Witness: For me having the book here.

Q. (By the Court): You mean prior to that, are entries from the business?

A. It was a partnership up to July 15.

Q. And the partnership business entries ended at that point, there on that page?

A. July 15.

Q. (By Mr. Marcussen): Page 10?

A. Yes, sir, but those, just like I told you.

Q. Now, I call your attention to the fact that, on Page 12 there are certain entries for receipts and it is your testimony, is it, that those are not in your handwriting? A. They are not.

Q. You never saw those entries at all, at any time? A. No, sir.

(Testimony of Catherine O'Connor.)

Q. And those entries for receipts are obliterated by ink? A. Scratched out.

Q. Can you account for that? [115]

A. No, I told you that in two trials.

Mr. Crittenden: You didn't tell this man.

The Court: I just have to guess what comes in here.

Q. (By Mr. Marcussen): I will show you, if your Honor is interested in looking at this, these are the admitted entries.

The Court: Page 12?

Mr. Marcussen: Some of the ending entries over on Page 13, the ballgame and other items for groceries were in her husband's handwriting.

Q. (By Mr. Marcussen): Now, these are the entries which she denies making, and those are the entries for the receipts.

I would like to call your Honor's attention to the fact that, just for the record, in the trials below, in the criminal court, expert testimony was offered on behalf of the government.

The Court: It is in the record.

Mr. Crittenden: Both ways, your Honor.

The Court: I don't believe I have had very many cases where handwriting experts were called that both sides seemed to have any difficulty getting an expert.

Mr. Marcussen: There was some difficulty in this case.

The Court: That is the situation in cases where [116] there is opinion of value coming in.

(Testimony of Catherine O'Connor.)

Q. (By Mr. Marcussen): Mrs. O'Connor, about the water heater. You testified about that. Do you recall how much you paid for it?

A. I don't know offhand.

Q. Was it approximately \$300?

A. Yes, something like that.

Q. And I think you testified that you purchased that three or four months after——

A. I said I wasn't sure, Mr. Marcussen.

Q. You can't ascertain it? Let me finish my statement. I think your testimony was that it may have been about three or four months after the time you purchased the apartment?

A. Wait a minute now.

Q. Now, the apartment was purchased, was it not——

A. If you will just let me think—I bought the apartment in the fall of '43, and it was, I think it was some time—now, I am not sure—for sure—but I think it was some time in the summer, I believe, of '44, I believe it was. I believe it was. I am just saying I think, because I don't want to be pinned down on it, but it had to be some time in the year of 1944.

Q. It is in your interest to be pinned down, so we can get it in the proper taxable year.

A. You wouldn't want me to lie about dates, would you? [117]

Q. Certainly not.

The Court: You give it to the best of your

(Testimony of Catherine O'Connor.)

knowledge, and if you don't know, why, of course you can't testify.

Mr. Crittenden: I believe it appears in the evidence, the exact date, in the record that we have here.

Mr. Marcussen: I will pass over that.

Q. (By Mr. Marcussen): Now, is it your testimony that you hired Mr. Bosserman to do some monthly work for you by way of auditing your records? A. Yes, I did.

Q. When did you first do that?

A. He made up the first report for the income tax in 1942.

Q. I am asking you whether you ever hired him to audit your books and records, Mrs. O'Connor. I am not talking about the income tax.

The Court: She is fixing the time she hired him.

The Witness: I had to hire him to make them up, didn't I?

Q. (By Mr. Marcussen): You stated, as I recall, that you hired him for the purpose of making monthly audits of your books. Did you testify to that? [118]

A. I told you that Mr. Bosserman made up all my sales tax papers, all my withholding papers, and any kind of tax papers that had to be made up, whether they were monthly or not.

Q. When did he begin doing that?

A. When he first made the income tax of '42.

The Court: Early in 1943?

The Witness: '43, yes, sir.

(Testimony of Catherine O'Connor.)

Q. (By Mr. Marcussen): Did you ever engage him to audit your books and records for the purpose of preparing financial statements showing how much you made each year?

A. He never said anything about that.

Q. I am asking you whether you said anything about it?

A. I didn't know enough to say anything about it.

Q. Do you recall ever engaging him for the purpose of auditing your books and really getting your books and records straightened out?

A. When he had my books, I thought everything was being taken care of.

Mr. Marcussen: I think the record will show what happened, your Honor.

After these taxable years were over, she then engaged Mr. Bosserman for the purpose of making a complete audit. [119]

Mr. Crittenden: That was Mr. Bosserman's statement to avoid responsibility. Let's argue the facts of the case.

The Court: Let's get to the examination of this witness. If you have any more questions, why, ask them and let the witness answer them, and then if there is any question on other matters, why, we will depend on what the record shows.

Mr. Crittenden: While we are still at it, I renew my first objection. Counsel must, in the course of cross examination, be calling upon some of the matters he discussed with my client in my absence.

(Testimony of Catherine O'Connor.)

What they might be, I am not in position to state.

Mr. Marcussen: Your statements aren't testimony. Would you like to examine her?

Redirect Examination

Q. (By Mr. Crittenden): Do you remember when you went up to the Collector's office and do you remember who sat there at the time?

A. May I start from the first and tell about it?

Q. Who was sitting there? Will you point him out?

A. Mr. Sorrell and Mr. Krause and Mr. Tormey.

Q. Was this man there?

A. And Marcussen, yes.

Q. Was anybody else there?

A. I don't know whether you were there the first time [120] or not, Mr. Marcussen.

Mr. Marcussen: Would you tell the witness the date?

Q. (By Mr. Crittenden): What date was it?

A. It was in April, around about the middle of April, I think.

Q. About April 3, wasn't it, to be exact?

A. For dates I don't remember. I am not going to be pinned down for dates, because I don't remember, but this is what took place. Mr. McLaughlin, a former Internal Revenue man and a friend of Bill Jost, my ex-husband, called on me and asked me if I didn't want to go up just as an informal chat, to talk to Mr. Sorrell, that there wouldn't be another soul, and just us three, sitting there talk-

(Testimony of Catherine O'Connor.)

ing informally. He said, "You don't need to tell your attorney about it.

Mr. Marcussen: I object to the statement and ask that her answer be confined to the questions so it may be presented in an orderly procedure.

Q. (By Mr. Crittenden): What happened?

A. When we walked in there, Mr. Sorrell and Mr.—no, you weren't there, Mr. Marcussen. It was a big, heavy-set man. [121]

Mr. Marcussen: Mr. Lauder?

The Witness: Mr. Lauder.

Mr. Marcussen: Do you remember that name?

The Witness: Yes, sir, and Mr. Krause and Mr. Tormey came in later. He wasn't there right when we got there.

Mr. Marcussen: How much later? Do you remember?

The Witness: Within 10 or 15 minutes.

Q. (By Mr. Crittenden): What was said?

A. And I was kind of startled to think so many men would be there, because I was told there was going to be nobody but Mr. Sorrell.

Mr. Marcussen: I object to this as hearsay, what she was told and what her conclusions were and how many men were there. The record speaks for itself. I urge that this be presented by question and answer.

The Witness: I am just trying to tell——

The Court: What transpired at the meeting?

The Witness: Just a general talk of the previous trial, and Mr. Sorrell made the statement that he

(Testimony of Catherine O'Connor.)

knew that, as far as you folks were concerned, there was no fraud. You didn't feel there was fraud attached to it.

Q. (By Mr. Crittenden): Did they ask you any questions about fraud, what you did? [122]

A. I don't know, in the course of the talk, just how it was brought up, but Mr. Sorrell, he did say that.

Q. What did you say? Did they ask you any questions about the fraud? Did they ask you what you did?

A. Well, if there was an intent on my part and all that stuff.

Q. Did they ask you what you did?

A. If I willfully withheld. We were talking about the whole trial in general, yes.

Q. Did they ask you how the return was made out?

A. Yes, and I told them I relied on Mr. Bosserman.

Q. Did they ask you about how much money you had made?

A. I couldn't say, Mr. Crittenden, about that. Our talk up there primarily was just to talk to Mr. Sorrell and not to make an offer. We never made no offer.

Q. I am not talking about that. Did they ask you how much money you had, and what you did with the money?

A. I think the whole case was reviewed.

Q. How long were you up there?

(Testimony of Catherine O'Connor.)

A. Two hours, and we had to talk about something.

Mr. Crittenden: Well, your Honor, is it necessary to go through any more? They talked two hours on the merits of the case. I think that is a showing in this case that counsel will have to draw upon matters that he learned from my client in that time, which was unlawful and contrary to the [123] rules of this Court and illegally obtained.

The Witness: They asked me if Mr. Crittenden knew about it and I said "No," that I came up there——

Mr. Crittenden: I don't think evidence illegally obtained can be used in this Court.

The Court: Are you objecting to something?

Mr. Crittenden: I am renewing the objection that counsel is drawing upon evidence illegally obtained, for the purpose of examining this witness.

The Court: And you take this as a showing of that?

The objection is overruled. Let's get along with the case.

Now, if counsel will just pay a little attention to me here now—in these matters, we have Exhibit 5, as I recall it, and Exhibit 5 is the record in the second trial, and a part of Exhibit 5 is not only the parts, not only the transcript, various parts of that, but the exhibits in that, now some of them, they are segregated in groups and envelopes. We took them as they were offered, and if you gentlemen, in using them, don't use the utmost care in

(Testimony of Catherine O'Connor.)

pulling them out and seeing that they get back into the containers where they belong, then it is going to be awfully difficult for this Court to know where they belong, because I have to depend on you to see that they are there. [124]

* * * * *

Recross Examination

Q. (By Mr. Marcussen): Mrs. O'Connor, I am going to hand you a statement consisting of 13 pages, and it is entitled, "Statement of Catherine O'Connor," and the heading shows that it was taken on February 8, 1946, and I recall your attention to the last page thereof, and ask you whether or not that is your signature there.

A. Yes, that is my signature.

Q. And then I call your attention to the fact that there appears the initials "CO'C."

A. Mr. Tormey had me write that in there.

Q. That is a transcript of the conference you had, in part, at——

A. The conference I had, Mr. Marcussen, I know it is that and I signed for it and everything. I was so nervous.

Q. Your counsel will bring that out for you.

Mr. Crittenden: I think she has a right to answer the question.

The Court: He didn't ask her that. She has answered the question now. If you want to ask her questions when you have redirect, that is all right.

Mr. Marcussen: If your Honor please, this is a statement, a sworn statement, of the taxpayer,

(Testimony of Catherine O'Connor.)

sworn to before Paul Tormey, a Special Agent of the Bureau of Internal Revenue, and it contains certain admissions against interest, and also certain self-serving declarations.

We are particularly interested in those that refer to the amount of her inventory at the beginning of the period in July 1942, and the inventory at the end of the period December 31, 1944.

There is evidence in the record showing that working papers were handed to her at that inventory and were submitted to her for her consideration and for the consideration of her attorney, and that that took place some time previous and that she brought those papers and stated that they were a correct statement of what they purported to be, subject to certain changes that were indicated by her counsel at the time.

I would like to offer this as Respondent's exhibit next in order, subject to an opportunity for counsel to look at it. He is now looking at another similar statement which I will be prepared to offer presently.

The Witness: Your Honor, may I say something?

The Court: No. We have to proceed by question and answer method of trial. If we don't, we would never have an orderly trial. That is one of the reasons we have lawyers. [126]

Mr. Marcussen: I should say, if your Honor please, that copies of this statement, and also the statement that counsel is now looking at, were given

(Testimony of Catherine O'Connor.)

to the taxpayer and an opportunity afforded her counsel at that time to examine them.

The Court: Who was her counsel?

Mr. Marcussen: Her counsel was Mr. Heyman.

The Court: What is the date of that?

Mr. Marcussen: February 8, 1946, executed and subscribed and sworn to on the 21st day of February, 1946.

The Court: Now, as I understand it, these are statements that were made back in 1946 on a certain date.

Mr. Marcussen: And I think the other in December, 1945, if your Honor please.

The Court: And you are proposing to offer them in evidence?

Mr. Marcussen: Yes.

Mr. Crittenden: I will state this: If I have seen these, it has completely passed my recollection, and there are a lot of things here that I didn't have any idea the government had in a statement. They had certain statements in evidence. I thought that was what counsel was referring to. Now I see we have another one here.

The Court: What do you want to do about it?

Mr. Crittenden: There are 29 pages; I would like to finish it. [127]

Mr. Marcussen: The second statement that will be offered here, and which Mr. Crittenden is now reading, is a statement taken from the taxpayer, that one prior to Exhibit 33 of Exhibit 5 that is offered in evidence. That was the first statement

(Testimony of Catherine O'Connor.)

that I am now offering, this Exhibit 33, is a statement in which, among other things, she wished to make corrections.

The Court: What part is this to play in your further examination?

Mr. Marcussen: Just identify them and then not examine any further, just identify them and offer them in evidence.

Mr. Crittenden: He can do that and then let me read this. It won't hold the Court up.

Mr. Marcussen: That is quite all right.

Mr. Crittenden: I want you to realize that I haven't finished reading this.

The Court: I am interested in giving you the time, but I am just wondering if we could find a better time.

Mr. Crittenden: I appreciate your Honor's suggestion. We only read the things that were offered in evidence.

Mr. Crittenden: This was offered in evidence. I have been through this one.

The Court: There is one you have had her identify, and have called her attention to the initials, and let's get [128] it marked.

Mr. Marcussen: I offer as Respondent's exhibit next in order——

Mr. Crittenden: Are those your signature and initials?

The Witness: Yes.

The Court: Is there any objection?

(Testimony of Catherine O'Connor.)

Mr. Crittenden: No objection, subject to reading it, of course.

Q. (By Mr. Marcussen): Now, I hand you a second statement, Mrs. O'Connor, and it consists of 29 pages, and it bears the heading, "Statement made by Mrs. O'Connor in the office of the Intelligence Unit," and then is dated November 1, 1945, and I call your attention to Page 29 of that statement and ask you if that is your signature there?

A. Yes, sir.

Q. And whether or not you swore to the truth of those statements on December 7?

A. I didn't swear to nothing. I just put my name down there for them.

Q. Was this statement sworn to by you before Mr. Krause at the Intelligence Office?

A. I don't remember doing any swearing to any statement. Told me to write my name. [129]

Q. He told you to?

A. Put it in front of me and told me to write my name.

Q. You felt constrained to write your name? Did you do it voluntarily?

A. I did it voluntarily; you know, Mr. Marcussen, I was so excited.

Q. Your counsel will interrogate you about your excitement. I am not interested in that at the present time. I want to know whether or not you signed it. Did you understand what you signed?

A. I understood this was questions and things they were putting to me.

(Testimony of Catherine O'Connor.)

Q. And those are your answers?

A. My attorney tried to make an amended report and they wouldn't let him.

Q. Are those the answers to the statement that you made on that date? That is a question and answer statement, isn't it?

A. These are the questions. I don't know whether those are my answers or not until I read them, but that is my name.

Q. Then you say that is your name?

A. Yes.

The Court: Do those pages that have your signature, are they initialled likewise? [130]

Mr. Marcussen: No, they do not bear the initials.

Q. (By Mr. Marcussen): Now, I will ask you to read the last paragraph on Page 29, under which your signature appears. Just read it to yourself and familiarize yourself with it.

A. I never read that.

Q. Just read it first.

A. I have read it, yes.

Q. And you never read that? That statement?

A. No, sir, I never read nothing, after they got it typewritten up.

Q. Did you sign this in the presence of your counsel, Mr. Heyman? A. I think so.

Mr. Marcussen: I offer this as Exhibit next in order.

The Court: Is there any objection?

Mr. Crittenden: I would like to read it.

(Testimony of Catherine O'Connor.)

The Court: You want to withhold admission until you have read it?

Mr. Crittenden: She says it is her name, and your Honor will admit that in evidence.

The Court: I will mark it for identification.

Mr. Crittenden: If you will mark it for identification, I will have a chance to look at it. [131]

The Court: F for identification.

(The document referred to was marked for identification as Respondent's Exhibit F.)

Mr. Marcussen: Would you like to do the same with respect to the other exhibit?

Mr. Crittenden: It would probably be just as well.

The Court: The other one is already in, so I am going to leave it there, subject to any motion you might make at the conclusion of the trial, but this one will be for identification.

Q. (By Mr. Marcussen): I think you testified that Mr. Jost sold the liquor that you alleged that he stole from your tavern for \$2,000.

A. I said there were 13 cases of whisky taken. I didn't say I seen him steal it.

Q. That isn't my question. I will speak a little louder. I think you testified that Mr. Jost sold—

A. Oh, sold, yes. I thought you said "stole."

Q. —13 cases of liquor for \$2,000.

A. That was a report.

Mr. Marcussen: I move that that be stricken from the record on the ground it is incompetent, as hearsay.

(Testimony of Catherine O'Connor.)

The Court: Well, I am going to let the record stand because, if I sift it one time or another, why, it doesn't really make a lot of difference. I heard it for what [132] it was, namely, she said that was a report. [133]

* * * * *

Mr. Marcussen: Now, Mrs. O'Connor, I think you testified that Mr. McLaughlin was a friend of your husband? A. Yes, sir.

Q. Is he a friend of yours?

A. Not so much.

Q. Is he a friend at all? Do you consider him your friend? A. No, I don't think so.

Q. What is your relationship to him? [134]

A. Nothing.

Q. Were you enticed into that conference at the Bureau of Internal Revenue?

A. I thought—I considered it an enticement.

Q. By whom?

A. I explained before how Mr. McLaughlin kept coming down and telling me if I would come up with him to Mr. Sorrell, with Mr. McLaughlin to Mr. Sorrell's office.

Q. (By the Court): Who is Mr. McLaughlin?

A. A former Internal Revenue man. He is a bookkeeper now.

Q. Now, did you know him?

A. He is Mr. Jost's friend.

Q. Does he come into your place?

A. Yes, sir.

Q. Is he a customer?

(Testimony of Catherine O'Connor.)

A. When Mr. Jost is there, yes, sir.

Q. (By Mr. Marcussen): Has he ever come in there when Mr. Jost wasn't there?

A. He came in several times lately with his friends.

Q. How long has this enticement been going on?

A. I don't know whether you figure it an enticement or not. I am just telling you the facts.

Q. Are you still being enticed? [135]

A. I don't like the word "enticed."

Q. We don't like it either. I am glad to hear you say that.

A. I mean the thought of him—I don't know if he had any dealings with any of the rest of the men on that score.

Q. You don't know anything about that?

A. Well, you are asking me my opinion.

Q. I am not asking your opinion. I am asking whether anybody at that conference, outside of Mr. McLaughlin, enticed you into the conference room.

A. Mr. McLaughlin suggested, and before he suggested he had contacted someone for me to come up there.

Q. He did that before?

A. And told me he was all ready for me to come up.

Q. You didn't ask him to present your case up at the Bureau of Internal Revenue?

A. No, sir. We talked it over several times, but he said he would see what he could do for me by his former association with the Internal Revenue

(Testimony of Catherine O'Connor.)

men, perhaps. Maybe his knowing how to proceed in things would give me a hand, but it would only be in an informal way. It wouldn't be nothing official, and there would be nobody there but Mr. Sorrell.

Q. He proposed that? Is that correct? He promised that?

A. He told me that. I don't know whether you consider [136] it a promise. That is what he told me, told me I didn't need to tell my attorney.

Q. Did he represent you there at that conference?

A. He was supposed to represent me. He brought out a paper just in this way, Mr. Marcussen—he brought out a paper and wanted me to sign a power of attorney which meant nothing, as far as my attorney there. In other words, he told me it was necessary, for him to even talk, just to sit and talk, that it was the understanding I got.

Q. Power of attorney, is that correct?

A. Just to sit and talk, not to make any promises or any compromises, just so he be allowed to sit in. He said he didn't have a green card, or whatever you call it.

Q. Did you sign that statement there?

A. I signed it up there in Mr. Sorrell's office.

Q. Has Mr. McLaughlin continued to represent you in this case?

A. No, sir. I told Mr. Crittenden about it right

(Testimony of Catherine O'Connor.)

away. I at no time dispensed with Mr. Crittenden's service.

Q. You made that statement to whom?

A. A written statement.

Q. Did you tell any representative at that conference that you wanted Mr. Crittenden to continue representing you? A. Yes, sir.

Q. Now, getting back to Mr. McLaughlin—has he [137] continued to represent you in any capacity, with respect to your liability for taxes for these years that are now before the Court?

A. Only just to come up to talk to you, not to talk to you, but to talk to Mr. Boland.

The Court: Who is Mr. Boland?

The Witness: Mr. Boland is in the McAllister Building. I don't know what he represents.

Q. (By Mr. Marcussen): You don't know what he represents? A. No.

Q. You don't know that he is in the office of the Bureau of Internal Revenue?

A. I certainly do.

Q. Then you don't mean to say that you don't know who he represents?

A. I know he represents the government, but I don't know what department.

Q. Do you know he is connected with the Bureau of Internal Revenue?

A. I certainly know that.

Q. What was the purpose of your conversation with Mr. Boland?

A. I didn't talk to him at all. I didn't go with

(Testimony of Catherine O'Connor.)

Mr. Marcussen. I went with Mr. Crittenden. [138]

Q. You didn't appear with Mr. McLaughlin?

A. No, sir.

Q. How many times did Mr. McLaughlin appear there on your behalf?

A. I don't know that.

Q. Did you engage him to do that?

A. No, sir.

Q. You didn't engage him?

A. No, sir. He only done it as a friendly gesture for Bill, Mr. Jost.

Q. For Mr. Jost? A. Yes.

Q. You have been divorced from him for several years?

A. Yes. However, we are keeping company again.

Q. Now, did you at any time in the course of the conference of the Technical Staff, on April 3, 1950, make a statement to the people present that you were very much dissatisfied with Mr. Crittenden and with his services, and that you wished to dispense with his services in this case?

A. No, I did not.

Q. I am asking you if you made any further statement to the effect. A. The thing——

Q. Just a moment. I am asking you a question. I will ask you whether you made any further statement to the effect [139] that Mr. Crittenden was continually asking you for fees, to the effect that you didn't see how he could possibly get you off in this case, and that you would wind up with the

(Testimony of Catherine O'Connor.)

liability to pay, as well as the attorney's fees, and that you were therefore there for the purpose of settling your case and seeing if it couldn't be settled out of court? A. I did not.

Q. You never made that statement?

A. The only thing I said, I wished if it was possible, that Mr. Crittenden could get with you men and try to get a settlement, so I wouldn't have to go back in court, and I said I was going to tell him about it.

Q. Do you recall that I was there at that conference?

A. I can't remember you being there.

Q. Do you remember anybody getting up and leaving?

A. Mr. Tormey left and said he was going to see somebody.

Q. You are certain it wasn't I?

A. No. I thought it was Mr. Tormey.

Q. And you do not recall, do you, that I left the conference before any discussions with you were had about your tax liability?

A. I don't remember your being there.

Q. You don't recall my stating that, before we talk with you, I wished to check with my superior?

A. I don't recall.

Q. You don't recall my coming back?

A. I thought Mr. Tormey went out. I knew some man went out, but I thought it was Mr. Tormey.

Q. Did that individual make any statement?

(Testimony of Catherine O'Connor.)

Do you recall any statement made when he returned?

A. Something was said, but I don't recall what it was.

Q. Would it refresh your recollection that the statement was made by me at the conference that I had consulted with my superior, and that my superior had stated that it would be quite all right to discuss the thing with you, your income tax liability, and that it was the policy of the Bureau of Internal Revenue to afford every taxpayer an opportunity to be heard, and that we would not insist that you bring counsel in with you, who was representing you before the Tax Court?

A. I don't recall that at all. I don't remember nothing like that. The only thing I remember was saying that I wished Crittenden and you men could get together and see if you couldn't come to some settlement so I wouldn't have to go back into court.

Q. Do you remember the document you signed revoking all previous power of attorney?

A. That was done by Mr. McLaughlin, telling me in order to sit in the thing to talk alone with Mr. Sorrell, and [141] I signed that paper, giving him the right to sit in on my behalf to see only if we could give Mr. Crittenden a hand, not to get rid of him by any means.

Q. You thought Mr. Crittenden needed that aid?

A. Mr. McLaughlin gave me the idea that he had something in common with you people that

(Testimony of Catherine O'Connor.)

perhaps he could help Mr. Crittenden by something in a little private conference.

Q. Do you recall whether anything was said by you at that conference as to whether or not Mr. McLaughlin would be recognized as your representative? A. For the day only.

Q. For the day?

A. Just to sit in, that was my opinion, not to take over.

Q. Not to take over?

A. No, sir, because Mr. McLaughlin will tell you that he advised me the minute we got out to get in touch with Mr. Crittenden right away.

Q. Never mind what he told you afterwards. Just answer my questions.

You then were there representing yourself, is that correct?

A. I was, informally. I was given an idea that there would be no one there but Mr. McLaughlin, Mr. Sorrell and myself, just to talk. [142]

Q. You asked us, notwithstanding the fact that we said we could not formally recognize him under the circumstances—You asked that he be permitted to remain in the conference. Is that correct?

A. He told me coming down—

Q. I am not interested in what he told you coming down. I wish you would answer the question.

A. The only reason I gave him power of attorney—

The Court: Will you read the question?

(Question read.)

(Testimony of Catherine O'Connor.)

The Witness: No, I never asked him for him to remain in the conference. This paper was shown to me to sign for him as a power of attorney, so he could sit in and listen and talk in my behalf.

Q. (By Mr. Marcussen): What was your purpose in signing that?

A. Only just to be able to sit in and talk only, not to make any offer or nothing.

Q. Now, were certain documents handed to you, showing a computation of your net worth statement, and also of your income at that conference?

A. The whole trial—you had papers all over the table.

Q. I asked you whether certain documents were handed to you and given to you to take away from this conference. That [143] is what I mean. Do you remember that?

A. I don't remember. I don't remember anything about that.

The Court: In other words, you don't remember that any papers were given to you to be taken away?

The Witness: Mr. Tormey went along with Mr. McLaughlin and I up to the Internal Revenue Office to give Mr. McLaughlin a certain paper. My thought, what I was doing, was to work in conjunction with Mr. Crittenden to see if there could be brought up a difference in the amount derived from you folks and with Mr. McLaughlin, and Mr. McLaughlin said he found a lot of errors.

Q. (By Mr. Marcussen): Never mind. Your counsel will bring out errors in due time.

(Testimony of Catherine O'Connor.)

Do you recall that Mr. McLaughlin asked to see your income tax returns for the taxable years here?

A. I don't remember that, no, sir.

Q. Do you remember that any documents——

A. I don't know that he ever seen them.

Q. Just a moment, please. Just answer the questions. Your counsel will take care of that on redirect examination.

Do you recall that any documents were handed to Mr. McLaughlin for his examination at the conference?

A. No, I don't remember that. [144]

Q. You don't remember that? You don't remember, then, whether those documents were handed to you with a specific request, asking you whether you wished Mr. McLaughlin to see them, and you gave your assent to that? You don't remember that?

A. No. The only thing I remember was this in regard to papers. Mr. McLaughlin asked to see certain papers, and Mr. Tormey said he would turn it over to him if he would go up to the Internal Revenue Office Building, which we did, and the paper was turned over to Mr. McLaughlin.

The Court: That was after the conference?

The Witness: Yes, sir.

Q. (By Mr. Marcussen): Now, do you recall whether or not any discussion was had about your ability to pay the tax liability that has been assessed against you?

A. I told you, Mr. Marcussen, there, and I tell you again, that I have no money, and there was

(Testimony of Catherine O'Connor.)

never no offer made. We were talking in round figures. There was no compromise made.

Q. You didn't state, then,—

A. To my recollection you said something about the government wanting \$20,000, or something like that, and Mr. McLaughlin said, "I guess you wouldn't settle for \$10,000," but for me to have any money, I have no money. I am in debt [145] up to my neck.

Q. You said you had no money at the conference?

A. And I still have none.

Q. And that took a considerable portion of the time?

A. We were there two hours.

Q. Was it explained that we were not concerned with what money you had? Our duty was to determine your liability?

A. I don't know what you said up there about the liability. I was disappointed when we walked in, because I had no idea there were going to be four or five men throwing questions at me. I thought we were going to have a little chat with Mr. Sorrell.

Q. Questions were thrown at you?

A. Yes, but what they were now I can't remember. The whole trial was gone over.

Q. Did you feel you were being coerced in that conference?

A. No, sir, but you went over the same things over again, and I told you I didn't have any money, and the only thing I was up there for was to see if

(Testimony of Catherine O'Connor.)

Mr. McLaughlin could do some good to help Mr. Crittenden to try to come to a compromise.

Q. That is not responsive to my question. You don't recall your being informed at that conference by Mr. Sorrell that it was not our province to consider your ability to pay. It was our duty to consider the tax liability involved in this [146] case?

A. I don't remember Mr. Sorrell saying that to me.

Q. Do you remember whether or not Mr. McLaughlin asked you whether you wished to make an offer of settlement in the case?

A. Mr. McLaughlin didn't never ask me that.

Q. You don't recall his statement to you, "Do you want to offer \$10,000"?

A. No, Mr. McLaughlin will tell you, Mr. Marcussen, that we never offered——

Q. Just answer my question. A. No.

Q. That wasn't said?

A. As for a formal offer, we weren't there to make a formal offer. We were only there to talk, as I understood it.

Q. To help Mr. Crittenden?

A. That is for sure.

Q. Now, you don't recall, I take it then, that Mr. Sorrell told you that \$10,000 would not be regarded as an acceptable offer for settlement of this case?

A. All you gentlemen were talking in thousands of dollars.

Q. You don't recall? A. No.

(Testimony of Catherine O'Connor.)

Q. Do you recall his stating that \$10,000 would not be [147] an acceptable offer?

A. No, sir, I don't, because you were all talking.

The Court: You say you don't remember. All right.

Q. (By Mr. Marcussen): Now, I will ask you whether or not you then turned to Mr. Sorrell and made a statement substantially as follows:

"How about \$15,000? Would that do it?"

Do you recall making that statement to Mr. Sorrell?

A. No, sir, I never did say that. I never did say that.

Q. Then you don't recall Mr. Sorrell rejecting that offer?

A. No, sir, there was no rejection.

The Court: She wouldn't recall it if she said she didn't remember it.

The Witness: There was nothing like that said, your Honor.

The Court: All right.

Q. (By Mr. Marcussen): Is it your testimony, or is it not, that you were enticed into that conference by any representative of the Bureau of Internal Revenue?

A. I will say like I said before that the fact of Mr. McLaughlin being a former Internal Revenue man and considering him a friend of Mr. Jost, that we went up there primarily [148] to just talk, sit down and talk, as far as anyone enticing—with a rope around my neck, and dragging me up there, no.

(Testimony of Catherine O'Connor.)

The Court: Let me ask you this question, because if I follow you, you went up there because Mr. Jost and Mr. McLaughlin came and talked to you and you went up there at Mr. McLaughlin's suggestion?

The Witness: Yes.

Q. (By the Court): And so far as any of your answers that I have heard so far, it was your testimony that your trip up there was at Mr. McLaughlin's suggestion?

A. Yes, sir, he had already made the appointment with Mr. Sorrell.

Q. You didn't have any invitation from anyone else than Mr. McLaughlin? A. No, sir.

Q. (By Mr. Marcussen): Do you recall Mr. Sorrell's stating to you that it would hardly be feasible for the representatives of the Bureau to discuss your liability with you, in view of the fact that Mr. McLaughlin was unfamiliar with the issues in the case?

A. No, I don't believe I remember that, Mr. Marcussen.

Mr. Marcussen: That is all. [149]

* * * * *

Redirect Examination

Q. (By Mr. Crittenden): Mrs. O'Connor, I notice in here on February 8, 1946, at the time that Mr. Tormey, Mr. Krause, and Mr. Heyman were with you, did you go to the Bureau?

A. With Mr. Heyman, yes.

(Testimony of Catherine O'Connor.)

Q. To the Intelligence Unit's Office on McAllister Street? A. Yes.

Q. Do you remember an inventory they talked about as of the close of 1944?

A. Yes, sir.

Q. Did you give them a piece of paper at that time in your handwriting?

A. I made up an inventory right then, and give it to them. I mean I gave it to them out of my head. I was confused. I should never do a thing like that, because I didn't know what I was writing.

Q. Now, there are questions of rents here. Did you make up a rent statement for them and go over a list of rentals at that time?

A. They asked me about the rentals from 2710 Baker Street, and I told them the rentals applied back to the attorney until the apartment house was paid over.

Q. Did you make up a schedule of rentals, and how much you got on each one of the locations?

A. Yes, I think that the place was leased, it was \$20 a month.

Q. Did you put down the OPA schedule, or what you actually collected?

A. No, the OPA and then I had to refund some money back from the OPA.

Q. Now, was there any time in 1942 or 1943 as to these rentals above the bar, that you had any trouble collecting the rent?

A. Yes, because they set fire to the place in the back and I had to have them evicted. There were

(Testimony of Catherine O'Connor.)

Mexican people there, and they left an iron on and set fire.

Q. I don't want to know about that. I was just asking about the rentals. Was there any time that you didn't collect the rents in the OPA schedule?

A. Yes.

Q. Did you put that in the schedule that you gave the [151] men on the eighth day of February, 1946?

A. I forget.

Mr. Marcussen: Are you referring to schedules set forth in Exhibit E?

Mr. Crittenden: They are mentioned in the exhibit, and I am referring to those.

The Witness: Those apartments upstairs, half the time they were vacant, and when they were rented, they were just \$20 a month. One was \$18 and the other \$20.

Q. (By Mr. Crittenden): Did you show the vacancy at the time you made up the schedule in 1946?

A. No, sir. I don't think so. I don't think I did.

Q. They refer here to statement of discrepancy which you had a previous opportunity to examine. Did you take a copy of that home with you, or Mr. Heyman?

A. No.

The Court: No what?

The Witness: I didn't take them home.

Q. (By Mr. Crittenden): When you examined them, was it this date previous to the statement?

A. I never examined that at all, after they

(Testimony of Catherine O'Connor.)

typed it up there. I never read it back. I just signed it.

Q. Now, there is a statement of discrepancy, Larsen-Jost, [152] 1942 statement. Do you remember any kind of a paper like that?

A. The answer is no, I don't.

Q. Did they have a big sheet where they said you made a mistake in reporting income, that you initialled and signed?

A. I don't remember. I don't remember it.

Q. Now, here is the start of the inventory of 1942. Did you give them any figure?

A. Not that I can recall.

Q. Now, I would like to go back to 1942. On or about November 1, 1942, the Alcohol Tax Unit, in connection with the investigation of your floor tax return, made an inventory of liquor or merchandise on hand at the time, and arrived at a gallonage of 257.51; by the same method explained to you in connection with the inventory, you submitted on January 1, 1945, we have arrived at the money value of \$3,541.68.

Are you willing to accept this figure as representing, to the best of your knowledge, the inventory value on that date? And you answered, "Yes, sir."

Do you remember any such thing being said and answered?

A. I don't remember a thing like that.

Q. Now, you must have had something you were selling as of the first day of November?

(Testimony of Catherine O'Connor.)

A. There wasn't too much stock. What date was that? [153]

Q. November 1, 1942. You and Bill Jost had been married a little over six months, and you had had the bar about four months?

A. We had stock on hand. I don't know what the inventory was, what it would arrive at, but that was the time when it was hard to get whisky.

Q. Do you know what method they used in arriving at any value of 257.51? A. No.

Q. Was anything discussed about arriving at an inventory of 257.51 proof gallons?

The Court: That is a statement of gallons?

Mr. Crittenden: Then converted to dollars on some conversion basis, and I am trying to find out what it was.

Now, the next question:

"Now, Mrs. O'Conner"—

A. May I say something?

Q. Go ahead.

A. If anything was arrived at as a total, perhaps it was the beer and everything included in there, because if there was an inventory made it would have to be the whole totals down.

Q. Did you agree to a sum of \$3,541?

A. Not to my knowledge.

Q. Did they use any particular conversion figure between [154] proof gallons and dollars?

A. I don't know how they arrived at that.

Q. Was there any particular dollar sum when you were up there? A. No.

(Testimony of Catherine O'Connor.)

The Court: Well, those questions and answers——

Mr. Crittenden: These are questions and answers and I am trying to find out.

Now, Mrs. O'Connor, in the absence of a December 31, 1942, inventory which your previous testimony reveals was never taken, it is necessary to use the figures just mentioned, \$3,541.68, representing the December 31 inventory. Is this approximately correct, in your estimation?

"A. Yes, sir."

Q. Do you remember any such testimony as that? A. No, I don't.

Q. Did you make any guesses in inventory?

A. That is all I did, guess at questions and everything else.

Q. What were your guesses?

A. I was trying to tell them, to the best of my ability, but I was so excited, I really don't know.

Q. Did you guess something? You must have given them some figure. Now, what was the figure?

A. I can't remember, Mr. Crittenden.

The Court: I don't think you are going to get anywhere.

The Witness: I mean this is all foreign to me.

The Court: She very obviously is not going to be able to remember offhand now figures that very plainly she gave or didn't give back there at the time. All of her answers are that she doesn't remember.

Q. (By Mr. Crittenden): Does any of this bring back any recollection of what happened there?

(Testimony of Catherine O'Connor.)

Have you read this through during recess?

A. Yes, I did.

Q. At my suggestion? A. Yes.

Q. Did it bring back any recollection at all?

A. Not a bit. It was all such a conglomerated affair. I didn't know what I was saying.

Q. Now, there is a statement here where Mr. Krause is asking you,

"Mrs. O'Connor, referring back to the \$1,500 loss shown on your books, April, 1944, property investment, is that correct?

"A. That is right.

"Q. Is it not a fact that you did not pay any money whatever on that investment? [156]

"A. No, I didn't, Mr. Krause.

"Q. Why did you show it on your books?

"A. I don't know why I put it down, only to show that I was giving it to Heyman to sell for my mother."

The Witness: That is right.

Q. (By Mr. Crittenden): Do you remember that? A. I remember that.

Q. You remember the properties discussed?

A. Yes, sir. It was for Mr. Heyman to sell it for my mother.

Q. Then it goes on:

"Q. What is the closest approximation you can make, and I am taking in the beer and everything else, of the stock that was set down?

"A. Mr. Gragan never kept the stock on hand. We used out of the one bottle.

(Testimony of Catherine O'Connor.)

"Q. Was the inventory higher than when you bought the Divers' interest in July, 1942?

"A. Yes, a little more. Mr. Divers let me do all the buying."

And then it says further on,

"Q. What would be the best estimate, or the closest you could come on the beginning of January, 1942?

A. It ran \$750 and \$1,000. It wasn't a great deal." [157]

Q. Do you remember such testimony?

A. It couldn't have been any more than that, if it was that much.

The Court: Let me ask you a question: I heard the question read there and an answer which came along about "We used out of one bottle." What do you mean?

The Witness: It was hard for Mr. Gragan to get stock.

The Court: Who was he?

The Witness: My partner at the time, your Honor, and he would only buy a case at a time.

The Court: What do you mean "used out of one bottle"?

The Witness: Just set up one bottle for use to use, one called Bourbon and one Bar Whisky and one called Gin and one Bar Gin. In other words, we didn't have a big assortment of stuff.

Q. (By Mr. Crittenden): You poured it out of the bottle in which it was brought into some bottle labeled——

(Testimony of Catherine O'Connor.)

A. No, poured it out of the same bottle. I mean by that, we used the same bottle on the shelf. I didn't open any bottles unless he opened them first, and he would give me a bottle. We had a separate shift, and he would give me a bottle. We didn't have no big assortment. That is what I am [158] trying to tell you. We didn't have an assortment of bourbon, one or two called bourbon and one bar whisky.

Q. If someone said he wanted bourbon?

A. Always pour it from the bar whisky.

Q. Whatever was open at the bar?

A. That is what I would pour.

Q. What you mean is that you didn't have a selection? If someone would come in and say, "I want Old Forrester." A. No, we didn't.

Q. You just sold bourbon?

A. Yes, that is right, and the same with beer.

Q. (By Mr. Crittenden): You say this is your writing? A. That is right.

Q. And these initials are by you?

A. Yes, Mr. Tormey asked me to do that.

Q. Were there any changes in any of these when you signed them? I don't see any corrections. Did you go through and correct it?

A. I just signed every one of those pages. He told me to sign them.

Q. Are there any mistakes in here?

A. I never read them.

Mr. Marcussen: That was Government's Exhibit E, wasn't it? [159]

(Testimony of Catherine O'Connor.)

Q. (By Mr. Crittenden): Now, do you remember a conference that you went to, and your husband, O'Connor, went and Mr. Krause and Mr. Moore?

A. I don't know who all was there, but I know that Mr. O'Connor went with me.

Q. You didn't have any lawyer at that time?

A. No, that was it. I didn't know anything about it. They just told both of us to come up there.

Q. Did you look through this to read it?

A. I never got a chance to look through to see it until he went back up there, and he had me sign it.

The Court: It probably hadn't been transcribed.

Q. (By Mr. Marcussen): You say on the 7th day of December, did you read it through and correct it before you signed? A. No.

Q. Didn't you know what you were signing?

A. The government men, I figured they give us the promise that there was nothing to it, that Mr. Heyman wanted to make an amended report.

Q. I mean: Didn't you read this through?

A. No, sir.

Q. Now, you have read that paragraph. You certified you carefully read that. Did you read that at the time you [160] signed that?

A. No, I didn't. I never read all this over, at all.

Q. Now, the second time you went in there——

A. This was the first time.

Q. December 7?

The Court: When?

(Testimony of Catherine O'Connor.)

Mr. Crittenden: 1945.

The Court: Now, is that when you say you didn't have an attorney or did you have?

The Witness: My husband, Mr. O'Connor, went there with me the first time and the second time Mr. Heyman went.

Q. (By Mr. Crittenden): Now, you see here Mr. Alvin Larsen, Mr. William Yost. Who is Yost?

A. That is a misprint.

Q. Did you correct it?

A. I didn't read it, I tell you. It isn't Yost. It is Jost.

Q. You used that as your married name?

A. J-o-s-t, not Y-o-s-t. They never asked me to read it, though.

Q. Now, the time you went down there, the first time, which was November 1, was everything that you said at the meeting written down?

A. On November 1, you mean? [161]

Q. Did they have a court reporter, a stenographer there?

A. Some little lady in there, yes.

Q. Did they start right out asking you what your name was? Did they ask you to raise your right hand right away?

A. I can't recall that.

Q. Did you raise your right hand?

A. I don't know if I did or not. I can't recall that.

Q. Did they ask you that—did they tell you that under the Constitution you have the right to

(Testimony of Catherine O'Connor.)

refuse to answer any questions which were asked, which you believed might incriminate you? Did they suggest that? A. I don't remember.

The Court: You don't remember? All right.

The Witness: I don't remember.

Q. (By Mr. Crittenden): Did they say they could use this against you?

A. I don't recall them saying it. I am telling you I don't recall them saying that.

The Court: Do you mean by that they didn't say it, or you just don't recall it?

The Witness: I don't recall it.

Q. (By Mr. Crittenden): Then I will read further:

"Q. Then it would be 1940 and 1941 returns that [162] Burt Morgan prepared?

"A. Yes, Morgan.

"Q. And 1943 and 1944 were prepared by Bosserman? "A. That is right.

'Q. And where did the information come from, shown in those returns?"

Mr. Marcussen: What is the purpose of reading this?

Mr. Crittenden: Well, I thought it was sort of jointly and there was nothing underhanded about it.

"Q. Mr. Morgan did not keep them correctly?

"A. No, I didn't say that. I said that we made notations.

"Q. You say that he recorded \$20 a day to the Board of Equalization?

(Testimony of Catherine O'Connor.)

"A. No, we had an accountant who came in. I don't know what his name is now."

Q. Do you remember anything like that?

A. Yes, I do.

Q. I am trying to refresh your recollection.

A. I don't remember them asking me this stuff.

Q. Do you remember that you had an accountant before Bosserman?

A. I don't remember their asking me, but your reading this back to me—we had Burt Morgan.

Q. I mean, when they did ask you, did they ask you [163] about Burt Morgan? Did Mr. Krause ask you?

A. I think they asked me who compiled the income taxes before Bosserman took over, because they went back to the time——

Q. Do you remember them asking you questions about how the books were kept?

A. No, sir; no.

Q. Do you remember their asking about what basis you——

A. I remember them asking me questions as to how I acquired my interest up there with Mr. Gragan.

Q. Did they ask you how Mr. Gragan and you kept the books?

A. I don't remember that.

Q. Would you say they did or they didn't?

A. I don't remember them doing it.

Q. Do you remember a lengthy examination up

(Testimony of Catherine O'Connor.)

there, the first time you went up, with Mr. O'Connor?

A. They all seemed lengthy to me, every time they got me up there.

Q. Did they ask you if anybody threatened you or coerced you when you were up there, to make your answers? A. I don't recall.

Q. Well, now, there is your signature here above Mr. Krause's? A. Yes, sir. [164]

Q. You say you didn't read this or correct it?

A. He told me, he said, "This is your testimony. Sign here," and I did.

Mr. Crittenden: This is Exhibit F for identification.

The Court: Are you through now?

Recross Examination

Q. (By Mr. Marcussen): And you testified you don't remember reading this at all and never made any corrections to the statement made?

A. I don't remember, Mr. Marcussen. I told you that.

Q. Did you testify that you didn't remember? Is it your testimony that you don't remember making them or that you didn't?

A. I did not read that through.

Q. You did not read that through, and did not correct it?

A. I don't remember correcting it.

Q. You did not correct the spelling of the name Yost? A. No, sir, I did not.

(Testimony of Catherine O'Connor.)

Q. I hand you Exhibit 33, which was a part of the exhibit in the criminal case in the second trial, which is part of Exhibit 5 in this case.

Mr. Crittenden: It is in evidence, counsel.

Q. (By Mr. Marcussen): And ask you whether that is your signature? [165]

Mr. Crittenden: We will stipulate it is.

Q. (By Mr. Marcussen): Now, I call your attention to the fact that the question appearing at the foot of the first page:

"Q. Mrs. O'Connor, we are referring here today to a sworn statement that you previously submitted to this department on November 1, 1945, a copy of which I believe you have before you.

"A. Yes, sir.

"Q. Do you now wish to amend some of the answers and statements made in that statement?

"A. Yes, I do, please.

"Q. Throughout that statement there is the name Maddock. Should the spelling be Mattick?

"A. Yes, sir.

"Q. And also throughout that statement, where the name Yost is mentioned, should the name be Jost?

"A. Yes, sir.

The Witness: I don't remember that.

Q. (By Mr. Marcussen): Do you say that did not occur?

A. I didn't say it didn't occur. I say I don't remember it. I don't remember your going back over those names.

Mr. Marcussen: That is all. [166]

HENRY SORRELL

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Marcussen): Will you state your occupation, Mr. Sorrell?

A. Technical Adviser, Technical Staff, Pacific Division.

Q. Briefly, what are your duties?

A. Conferring with taxpayers or their counsel, or both, with a view of settling cases to avoid litigation.

Q. And have you been here this afternoon and listened to the testimony of Mrs. O'Connor?

A. I have.

Q. You heard it all, did you? A. I did.

Q. I am directing your attention particularly to her testimony concerning the conference which occurred at the Technical Staff's Office on April 3, 1950. You were present at that conference, were you? A. I was.

Q. Do you recall all that went on at that conference?

A. Well, fairly well, although I made a memorandum of [167] it very shortly after the conference.

Q. Have you read that memorandum recently?

A. I have.

Q. Does it contain all of the substance of what occurred at that conference?

(Testimony of Henry Sorrell.)

A. I would say practically all of it.

Q. Does it contain any reference to the statements made by Mrs. O'Connor concerning her reason for being at that conference?

A. Yes.

Q. And do you recall whether or not you said anything about her dissatisfaction with the service of Mr. Crittenden?

A. Yes, she said she was dissatisfied with the service and didn't want him to represent her any further.

Q. Do you recall whether Mr. Krause was present at that conference?

A. He was not.

Q. Do you recall whether I was present at that conference?

A. You were.

Q. Do you recall whether I left the conference some time after it had been under way?

A. You left the conference shortly after it was under way.

Q. And do you recall what I said when I left that [168] conference?

A. Yes, you said you wanted to consult with your superior in the office as to the propriety of conducting this conference with Mrs. O'Connor.

Q. And then did I return to that conference shortly thereafter?

A. Possibly ten minutes later.

Q. And did I make a statement then as to whether or not we would confer with Mrs. O'Connor?

A. You did.

Q. And what did I say about that, at the time?

(Testimony of Henry Sorrell.)

A. In substance, that you had been informed that it was a Bureau policy to give the taxpayers an opportunity to come into the Bureau and discuss their case, and that it was perfectly all right for us to come and talk to Mrs. O'Connor.

Q. Will you state, please, what was the substance—state, please, what Mrs. O'Connor said was the purpose of her being there?

A. She said she was there for the purpose of trying to settle her case. She had been through two court trials and didn't want to go through another one.

Q. Did she say anything about her own ideas of the prospect of success in this trial?

A. She said that she was informed about the offer that Mr. Crittenden had made. I think it was about \$1,600. My [169] recollection is that she said it was a perfectly ridiculous amount, in view of the fact that she had been tried in two court trials and had been convicted and sentenced and served time, and she was prepared to make a substantial offer of the settlement.

Preliminary to the offer of settlement, did she make any statement about her financial position?

A. Yes, she said she was practically broke. That was the substance of her statement; as a matter of fact, in the course of the conversation, she dictated to Mr. McLaughlin, who was sitting at the end of the table, a statement of her assets and liabilities and he made notations on an envelope.

Q. Was there any discussion at all concerning

(Testimony of Henry Sorrell.)

the law or the merits of this case at this conference?

A. Only one reference to the law and that the burden of proof was for them to show that the Commissioner was wrong. That was as far as it went.

Q. With respect to the deficiency?

A. That is correct.

Q. Did you also state to her that the burden of proof was on the government to prove the fraud?

A. Absolutely.

Q. And outside of that, was there any discussion as to the actual merits of this case?

A. No, after Mrs. O'Connor had talked about her [170] financial condition, and that was discussed, I would say, at a greater part of the conference, I suggested that possibly she and Mr. McLaughlin had better talk the situation over. I said, "We had better let you look this schedule over." He had a schedule of assets and liabilities and net worth, and she said she would like to have that done, so I asked her if it was agreeable for us to let Mr. McLaughlin look over this statement of assets and liabilities and he said it was, and I handed it to Mr. McLaughlin and he looked it over for a while and then he said he would like to get a copy of it, so that he and Mrs. O'Connor could go over the matter at leisure.

Q. Do you recall whether there was also handed her a copy of income, income statement, for the

(Testimony of Henry Sorrell.)

taxable years involved here in connection with that net worth statement?

A. Oh, yes, there was.

Q. And that was shown to her and to Mr. McLaughlin?

A. Shown to her before it was shown to Mr. McLaughlin, because we were not taking any chances.

The Court: What do you mean?

The Witness: Because Mr. McLaughlin was not entitled to practice before the Bureau of Internal Revenue and we told him he could come in with her and sit in the room but could not appear as an advocate.

Q. (By Mr. Marcussen): And was there any discussion had about that statement? [171]

A. I don't believe there was any discussion, because Mr. McLaughlin didn't understand it and wanted an opportunity to look it over.

Q. Do you know whether or not the taxpayer requested you to show to Mr. McLaughlin her income tax for the years involved?

A. Mr. McLaughlin said he would like to see the returns, and I took each return in itself and showed it to Mrs. O'Connor and asked if it was her return, if it was her signature on the return, and she said it was. I asked her if it was agreeable to her that Mr. McLaughlin looked the return over, and I handed it to Mr. McLaughlin, as I did for each of the returns for the years '42 to '44 inclusive.

(Testimony of Henry Sorrell.)

Q. Was there any discussion about that return at the time? A. Very little, if any.

Q. And I think you stated there was very little, if any, discussion, about the net worth statement?

A. That is correct.

Q. And outside of whatever discussion was had with respect to those two items and the discussion about the burden of proof as to the deficiency being upon Mrs. O'Connor, and that the burden of proof was on the government with respect to fraud, was there any discussion about the law in this case?

A. No. [172]

Q. By anybody at the conference?

A. No, and I was there at the time of the entire conference.

Q. Will you state how it was that this conference came about?

A. Well, it was on the afternoon of March 30, this year, 1950, I was called by Mr. McLaughlin and I had never met nor heard of the man before, who represented himself to be a friend of Mrs. O'Connor's and said that he wished to come down to see me and talk the tax case over, and I said, "Mrs. O'Connor is represented by Mr. Crittenden. How about him?"

He said, "Mrs. O'Connor doesn't wish Mr. Crittenden to represent her any more. She is very much dissatisfied with him and she wants me to come down and represent her."

So I said, "Well, we couldn't do that unless there is a power of attorney submitted," and he said, "I

(Testimony of Henry Sorrell.)

will get a power of attorney from her," and I said, "Any power of attorney will have to revoke any previous representation, because we will not deal with two attorneys." So he said that would be done and then he called—let me see.

Q. Do you have a memorandum there?

A. Yes, written shortly after what transpired.

The Court: Written by you?

The Witness: Dictated by me to my secretary and then, after talking with Mr. McLaughlin, I talked to Mr. Lauder, [173] who is my immediate superior, head of the local office, in the Technical Staff, and told him what had transpired, and he said, "Find out whether McLaughlin has been admitted to practice before the Bureau," and so the 30th was on Thursday, and the next morning, on a Friday, the 31st, I think it was shortly after 11 o'clock, McLaughlin called again and said he had discussed the matter with Mrs. O'Connor and she would execute a power of attorney, authorizing him to represent her, and so then I asked him if he was empowered to practice in the Treasury Department, entitled to practice before the Tax Court, and he said, "No," and I said we couldn't accept his representation, but if he would come with Mrs. O'Connor she could be present in a conference and we would discuss with him anything she wanted to discuss with us, so then I think I arranged a conference for that afternoon at 2 o'clock. That is right. And about 15 minutes later, he called me back and said Mrs. O'Connor was doing a lot of cooking there

(Testimony of Henry Sorrell.)

by herself and wasn't able to have anyone to take her place, so we made an appointment for the following Monday, April 3, at 10 o'clock.

Q. Now, I will ask you whether or not Mrs. O'Connor thereupon made an offer of settlement of \$10,000?

A. During the course of the conference, after talking about her financial condition, etc., Mrs. O'Connor talked to Mr. McLaughlin and there was an offer of \$10,000 made. [174]

Q. Do you recall whether or not Mr. McLaughlin turned to her and said, "How about it, Kay? Do you want to make an offer of \$10,000?"

A. She did, that is correct.

Q. Do you recall what her answer to that was?

A. She said yes, she had been through two trials and she wanted to get rid of this case.

Q. What did you say about the acceptability of the offer?

A. I told her it was unacceptable.

Q. Do you recall what she said after that?

A. Let me see if I have a note.

Q. If you can't recall, will you refresh your recollection from that memorandum?

A. After turning that down, they said, "How about \$15,000? Would that do it?" or something like that.

Q. And did you reject that offer?

A. Yes.

Q. Now, by the way, how did it come about, what was the occasion for making the memorandum?

(Testimony of Henry Sorrell.)

Ordinarily do you make a memorandum?

A. I generally make a memorandum of a conference that I have, and the reason I made this one was because on the afternoon of the 3rd, I will have to preface this, lead up to it,—on the 29th of March I initialled a letter, advising Mr. Crittenden that we were turning down the first offer he [175] made of around \$1,600, and of course I had no knowledge of when the letter was mailed. I understand it was mailed on the 30th.

The Court: That is, the 30th of March, this year?

The Witness: Yes, sir, so that when Mr. McLaughlin called me, I assumed that he was calling in response to the receipt of that letter, because we sent a copy to Mrs. O'Connor. So on the 3rd, or the afternoon of the 3rd, after Mrs. O'Connor and Mr. McLaughlin had left with Mr. Tormey to get a copy of this schedule that was being given to them, why, Mr. Crittenden called me and asked about the discussion and said he received a letter and he wished to see if there was some way, whether the staff representative had a figure in mind that would be acceptable.

I informed him that Mrs. O'Connor had visited this office that morning for the purpose of discussing a settlement of her case, so he appeared to be very angry and made quite an ugly remark over the telephone.

Q. What did he say to you on the telephone?

A. The first thing he said was, "I am a sad son of a so and so," and I never heard—

(Testimony of Henry Sorrell.)

Q. Did he say "so and so"?

A. He said "son-of-a-bitch."

Mr. Crittenden: I will stipulate I said it.

The Witness: That is what he said exactly. [176]

Q. (By Mr. Marcussen): Go on.

A. I told him that Mrs. O'Connor had the right to come down to our office personally to talk over a tax case and that, since she had informed us at the conference that she didn't want Crittenden to represent her, we felt at liberty to talk to her and Mr. McLaughlin who accompanied her, and she had also presented at the conference a power of attorney signed by her; as a matter of fact, signed in the conference, it had been prepared before coming there by Mr. McLaughlin, and that power of attorney revoked all previous powers of attorney.

Q. Do you have that with you here?

A. The power of attorney? I have not. I imagine it is in the general files in the office.

Q. Will you make an effort to find it and bring it to court? A. Yes.

Mr. Marcussen: That is all. You may cross examine.

Cross Examination

Q. (By Mr. Crittenden): Now, I will show you here my office copy of a letter of March 9, and ask if that is the letter you are referring to in which I made the offer.

A. I would say so. I am not going to read it entirely. [177] I would say it is a copy of it.

(Testimony of Henry Sorrell.)

Mr. Crittenden: There is no objection to using the copy, is there?

Mr. Marcussen: No objection, subject to check for inaccuracies.

The Court: It will be marked in evidence as Exhibit 13.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 13.)

Q. (By Mr. Crittenden): Now, Mr. Sorrell, you knew I was licensed to practice before the Board of Tax Appeals?

A. We wouldn't have recognized you if you hadn't been.

Q. And I appeared in cases before the war, before it became the Tax Court, when it was the Board of Tax Appeals?

A. One case, yes.

Q. And you knew that prior to this I had represented Mrs. O'Connor and she had come with me to a conference in your office, and Mr. Marcussen was present?

A. That is correct, yes.

Q. And we had discussed a compromise settlement at that time, hadn't we?

A. I don't know what you mean by a compromise—a possible settlement.

Q. You also knew that Mr. Tormey and I were on such [178] terms that when I held out my hand to Mr. Tormey he wouldn't even shake hands with me. You knew that. You knew the background of what happened in the District Court case?

(Testimony of Henry Sorrell.)

A. I don't know the background, but I know what happened in the office.

Q. Did you tell Mr. Tormey that Mrs. O'Connor was coming up there on April 3rd?

A. Did I tell him about it? He was present.

Q. How did he know to come there that day?

A. Called him to arrange for him to attend the conference.

Q. You told Mr. McLaughlin you were going to have him there?

A. I did not. I didn't feel it was any of McLaughlin's business if he was present.

Q. Did I ask you on the telephone as to the conference on the afternoon of the 3rd what transpired at that meeting?

A. You certainly did.

Q. What was the answer?

A. I told you I wouldn't tell you.

Q. You were present in a conference about the 19th day of April. Do you remember that conference?

A. I remember a conference. The exact date I don't know.

Q. It is right here in the letter, April 19, at 10:00 [179] a.m. in case there is any question, I will let you look at Mr. Neblett's letter.

A. That is right.

Q. Do you remember at that time I asked you what took place at the conference?

A. That is right.

Q. And I wasn't told, was I?

(Testimony of Henry Sorrell.)

A. I don't believe you were.

Q. Now, Mr. Lauder hadn't been in this conference before, had he, any time I was there?

A. No, he had not, that is correct.

Q. Is it customary for him to attend when an unlicensed person is present, but when a licensed——

A. I call Mr. Lauder in when I feel there is need of it.

Q. You felt it was necessary to share responsibility?

A. No, I felt he should be in there because it was somewhat unusual.

Q. And you felt that with Mr. McLaughlin and without my presence, it would need somebody like Mr. Lauder to protect the government's interest, but when I was just alone, there wasn't any necessity of that precaution?

A. No, that was not the reason. It was rather an unusual conference, requested by the taxpayer, and I felt his presence was necessary.

The Court: Which conference was this? [180]

The Witness: The one Mrs. O'Connor attended.

The Court: She attended? You mean the one——

The Witness: The one that she came to our office with Mr. McLaughlin.

Q. (By Mr. Crittenden): At the time of that conference, you discussed the question of whether or not there was fraud?

A. We did not.

(Testimony of Henry Sorrell.)

Q. And you discussed how much was the liability?

A. We told her what the liability was, but we never discussed the merits of the case.

Q. Didn't you ask her about what money she had received and what she had handled?

A. We did not.

Q. In all the two hours' talk nothing was mentioned as to the merits of the case?

A. The only time the merits of the case were discussed was when we got to discussing that particular schedule which was presented to Mrs. O'Connor and then shown to Mr. McLaughlin.

Q. Now, that schedule, is that the same one that you gave me in that black and white photostat?

A. I think it is, yes.

Q. It is in the exhibits here.

The Court: Exhibit 6. [181]

The Clerk: 10, if your Honor please.

Q. (By Mr. Crittenden): I show you and ask you if this isn't the same thing.

A. I would say so, yes.

Q. And that is what you were discussing, the factual matter that makes this up?

A. Positively not. We didn't discuss it.

Q. You discussed the figures?

A. We did not. They asked to have a copy presented to them to discuss at their leisure. It was not discussed at the conference.

Q. In all the two hours, the only thing discussed was the things you have just outlined?

(Testimony of Henry Sorrell.)

A. And a lot of it was about you, about she didn't want you to represent her any longer, how you were asking for money all the time, and most of it was on the question of inability to pay.

Q. Now, Mr. Sorrell, how long have you been on the technical staff?

A. 12 years; in the federal service, about 30.

Q. And you are familiar with the rules of practice?

A. I am.

Q. I am going to show you the rules of practice, Rule 24, Subdivision 3 (b). I want to ask you if you know this rule about the withdrawal of counsel? [182]

A. Yes, I do.

Q. And you did at that time on April 3, 1950?

A. I did not.

Q. When did you learn that rule?

A. I have known that rule ever since I have been on the staff.

Q. Then you did know it at that time?

A. Oh, yes, I knew the rule.

Q. You knew I had no power of attorney on file with your department in this case, didn't you?

A. I knew you were representing the taxpayer before the Tax Court.

Q. And I had no, what you call, "power of attorney"?

A. I didn't know.

Q. It is not in the file, is it?

A. I don't know.

Q. You knew what file you were handling?

A. You are an attorney of record in the case.

Q. You don't need a power of attorney?

(Testimony of Henry Sorrell.)

A. That is correct.

Q. And you knew that I could withdraw only upon order of this Court, didn't you? I could do that only——

A. As far as I know, Mrs. O'Connor is the one that removed you.

Q. You are familiar with the rule, aren't you?

A. I am familiar with that.

Q. And you are also familiar with the other rules of the Tax Court, specifically this portion of Rule No. 2, which I am pointing to, starting here with, "Practitioners before this Court carry on their practice"——

A. I do.

Q. And at the time of April 3, were you familiar with that rule?

A. I would say I was.

Q. Are you familiar with any portion of the rule that says it doesn't apply to government counsel?

A. I don't know. I haven't read the entire book.

Q. I mean this particular point that practitioners shall carry on practice in a manner adopted by the American Bar Association.

A. I know of no exception to the rule.

Q. You know what the American Bar Association's rule is as to consulting with opposing litigants, don't you?

A. I couldn't say, because I am not an attorney.

Q. You know that a lawyer can't discuss the merits or go over a case or even discuss the case with the party on the other side, with the consent of the other attorney. You are familiar with that?

(Testimony of Henry Sorrell.)

A. Certainly.

Q. Did you have any idea that Mr. Marcussen had no [184] authority to have any change in these rules made by his immediate superior?

Mr. Marcussen: I object to that as argumentative.

The Court: Objection sustained.

Q. (By Mr. Crittenden): Do you have that memorandum that you made? A. I have.

Q. May I see it? A. Sure.

Q. Do you know the contents in here?

A. Fairly well, yes.

Q. Could you, or did you testify without the assistance of this, or did you need it to assist you?

A. In some instances I did and in some I did not. When I wasn't sure of myself I referred to it.

Q. Did you know at the time you made this that this was correct? At the time you made it did you know it? A. Oh, yes, absolutely.

Mr. Crittenden: I would like to offer this in evidence.

The Court: For what purpose?

Mr. Crittenden: That is what he used to refresh his recollection.

Mr. Marcussen: No objection.

The Court: It will be marked in evidence as [185] Petitioner's Exhibit 14.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 14.)

(Testimony of Henry Sorrell.)

Redirect Examination

Q. (By Mr. Marcussen): Who did the talking for the government in that conference, Mr. Sorrell?

A. I think I did a considerable amount of it.

Q. Who did most of it?

A. Well, I would say you or me, but I think I did most of the talking, because I know I was the one that handled all the returns that were handed to Mrs. O'Connor, and I know when we were talking about her net worth, I questioned her about that, so I would say I did most of the talking in the conference.

Q. Do you know whether I knew anything about the merits of the case at that time that I was in that conference? Do you happen to recall whether I was familiar with the merits of that case at that time?

A. With the merits of the case? I don't believe you knew a whole lot about the merits of the case at that particular time, it is my recollection, because you had made some review of it, but not a whole lot. That is my recollection of that time.

Mr. Marcussen: That is all. [186]

Recross Examination

Q. (By Mr. Crittenden): Mr. Marcussen was present at the prior conference that you and I had and Mrs. O'Connor?

A. Mr. Marcussen was present at the first conference with you and Mrs. O'Connor, and I believe he was present at the conference with you and Mr. Nestell. That is my recollection.

(Testimony of Henry Sorrell.)

Q. We pretty well explored a lot of facts. You presented the government's viewpoint and I presented the taxpayer's at the two prior conferences when Mr. Marcussen was present.

A. You did a lot of talking. Whether you presented any evidence, I don't know. I think you did mostly talking and arguing.

Q. You presented the government's viewpoint, didn't you?

A. Without any question, yes.

Mr. Crittenden: That is all.

The Court: You are excused.

Mr. Marcussen: If your Honor please, at this time I would like to offer in evidence Respondent's Exhibits E and F for identification.

The Clerk: E is in.

The Court: F is marked for identification. Is there any objection? [187]

Mr. Crittenden: No objection. We can take it for what it is worth.

(The document referred to was received in evidence as Respondent's Exhibit F.)

* * * * * [188]

PAUL W. TORMEY

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Marcussen): What is your occupation? [189]

(Testimony of Paul W. Tormey.)

A. I am a Special Agent in the Intelligence Unit, Bureau of Internal Revenue.

Q. How long have you been occupied in that position? A. Approximately five years.

Q. State very briefly what your duties are in connection with that position?

A. To investigate income tax cases where there is a suggestion of attempt to evade the tax.

The Court: You said you are in the Intelligence Unit?

The Witness: Yes, sir.

Q. (By Mr. Marcussen): Mr. Tormey, I hand you a part of Exhibit No. 5, offered in evidence in this case, which is to say specifically Government's Exhibit 24, which is a part of that exhibit.

* * * * *

Q. (By Mr. Marcussen): Returning that paper to you, which I just identified, Mr. Tormey, I ask you to state what that is.

A. This is a statement headed "Larsen-Jost, 1943 Statement of Discrepancies," and it lists items with the months, dates, and under the explanation, "Entered in check [190] stub or cash book as follows:" It gives the amount and then in the fourth column the distribution such as gambling loss, donation, with question marks after them, and the top of those headings the explanation by taxpayer.

Q. Did you prepare that statement?

A. This is in my handwriting, prepared by me, January 28, 1946, according to the initial in the corner.

(Testimony of Paul W. Tormey.)

Q. What was the purpose of preparing it?

A. In going over the taxpayer's book which is in evidence——

The Court: The black book you are talking about?

The Witness: Yes, sir, the items such as "Policeman, check entered, Harry Shannon, policeman, USO"—the repetition of items was confusing to us to know whether they were expense items or purchases or something similar, so we, on the basis of what information we could find in the book, made this preliminary distribution, gave this tax schedule to the taxpayer with the request that she go over it with her attorney and, at a later conference, be prepared to give us either approval of our tentative distribution of these items or corrections thereto, and you will notice that on many of the items there is a red line drawn through it and the item is transferred to a different column.

Q. Who drew the red lines?

A. I drew the red lines, at the conference on February [191] 8, 1946, in our office, attended by the taxpayer, her attorney, Mr. Heyman, and also attended by Mr. Krause and myself.

Q. Did you redistribute those items to the appropriate columns? A. That is right.

Q. There is certainly other writing appearing much later than the rest of it, and in a much finer hand. Whose writing is that?

A. Mr. Heyman was at this conference. That is his writing.

(Testimony of Paul W. Tormey.)

Q. I hand you another statement bearing the heading, "Larsen-Jost, 1943 Statement of Discrepancies, Purchase of 2710 Baker Street" and, up at the top, it bears the initials "PWT", and the date 1/25/46, and ask you whether that is part of that statement.

A. Yes, sir, it was originally prepared at about the same time as the page that we have just been talking about.

Q. Was it submitted?

A. And submitted to the taxpayer at the same time.

Q. To Mrs. O'Connor and her attorney?

A. That is correct.

Q. And it was discussed at this conference and such handwriting you will see is in Mr. Heyman's. He admitted at the conference that he had put that in in response to our [192] request for an explanation, and it should have been kept attached to this exhibit and offered in the Federal Court. That is my recollection of it, and I imagine that is the purpose of examination.

Q. Then the statement is not complete without that additional sheet which you have just handed me?

A. The statement, in so far as it goes, is complete; because these are small items of cash or check, disbursements that appear in the cash book, and these discrepancies are confusing items we ran into in connection with her purchase of 2710 Baker Street, her payment of Mr. Heyman partly in cash

(Testimony of Paul W. Tormey.)

and partly by the collection of rents that he managed for her, and also this matter of the Lachman check about which there has been testimony.

The Court: This last is on the second sheet?

The Witness: Yes, it is really a supplement to the first sheet.

Q. (By Mr. Marcussen): Now, is the statement, as prepared by you correct, as corrected by the notations on there, put on there by Mr. Heyman?

A. Yes, that is correct, and these were done in the presence of the taxpayer and Mr. Heyman, the attorney, at this conference of February 8, and it is so referred to in the sworn statement that was given. [193]

Mr. Crittenden: If you want to stipulate that the statement of discrepancies go in, I will so stipulate. I am sure we will be here more than two hours.

Mr. Marcussen: You have no objection?

Mr. Crittenden: No objection, in fact, we need it for explanation.

Mr. Marcussen: Upon counsel's stipulation, I would like to offer that in evidence. I don't know whether the procedure would be to offer it as the government's next exhibit in order or whether it is a part of Exhibit 5.

The Court: It will come in as your next exhibit, but you can let the record show that it is a continuation or supplement to a paper that is already in evidence as part of a record in one of the trials.

The Clerk: That will be G.

(Testimony of Paul W. Tormey.)

The document referred to was marked and received in evidence as Respondent's Exhibit G.)

* * * * * [194]

HENRY SORRELL

recalled as a witness for and on behalf of the Respondent, having been previously duly sworn, was further examined and testified as follows:

Redirect Examination

Q. (By Mr. Marcussen): Mr. Sorrell, have you produced a power of attorney which was signed in your presence at the conference of April 3 in the office of the Technical Staff?

Mr. Crittenden: If you will state that it was signed, I will consent to its going in the record.

Mr. Marcussen: And that is your power of attorney that you mailed to us thereafter?

Mr. Crittenden: Yes, I will stipulate that is the one I mailed with that letter.

Mr. Marcussen: This is referred to in your letter to the Technical Staff.

Mr. Crittenden: That is right. You will state this is a copy of the letter that was sent. I turned that over to Mr. Nestell.

Mr. Marcussen: Subject to correction for inaccuracies, I would like to offer in evidence at this time as Respondent's Exhibit next in order a power of attorney signed by Catherine O'Connor in favor of Raymond K. McLaughlin.

The Clerk: Exhibit H.

(Testimony of Henry Sorrell.)

Mr. Crittenden: There is a misunderstanding. I [198] think I put the original in.

The Court: Exhibit H in evidence.

(The document referred to was marked and received in evidence as Respondent's Exhibit H.)

Mr. Marcussen: And as Respondent's Exhibit next in order a power of attorney executed on April 3, 1950, in favor of Mr. Crittenden.

The Court: Exhibit I in evidence.

(The document referred to was marked and received in evidence as Respondent's Exhibit I.)

Q. (By Mr. Marcussen): I hand you Petitioner's Exhibit 2 and ask you whether or not that is Mr. Neblett's signature on that letter.

A. It is. As a matter of fact, I saw him sign it.

Q. Now, I will ask you whether or not, prior to the conference of April 3, 1950, you had ever seen Mr. McLaughlin or knew of him before that date?

A. I never heard of him prior to March. I never saw him before April 3.

Mr. Marcussen: That is all. Thank you.

Recross Examination

Q. (By Mr. Crittenden): Mr. Sorrell, isn't it customary, under the practice of the Treasury, to notify an attorney who is representing a taxpayer, when some other power of attorney is tendered by [199] the same taxpayer?

(Testimony of Henry Sorrell.)

A. I don't know whether it is customary or not.

Q. It is always done in your office, isn't it?

A. I couldn't answer that question, because I don't have anything to do with that. I generally take powers of attorney and submit the power of attorney to a clerk who handles those things, so what is done I couldn't answer.

Mr. Crittenden: That is all.

* * * * *

PAUL W. TORMEY

recalled as a witness for and on behalf of the Respondent, having been previously duly sworn, was further examined and testified as follows:

Direct Examination—(Continued) [200]

* * * * *

Mr. Marcussen: If your Honor please, at this time I will offer in evidence Respondent's Exhibits J, K, L, M and N.

The Court: Is there any objection?

Mr. Crittenden: No. I want the record to show that Exhibits K and L are the small photostats in their original form.

* * * * *

Mr. Marcussen: Let the record show that Exhibit M consists of three separate statements.

Mr. Crittenden: Mr. Tormey's computations?

Mr. Marcussen: Yes.

(The documents referred to were [202] marked and received in evidence as Respondent's Exhibits J, K, L, M, and N.)

(Testimony of Paul W. Tormey.)

Q. (By Mr. Marcussen): Mr. Tormey, do you have in your possession a computation showing the rents received by Mrs. O'Connor during the taxable years on the Baker Street property?

A. Yes, sir.

Q. Now, will you describe briefly what the content of that schedule is, consisting of two pages?

A. The first page is restricted to the year 1943 and the second page to the year 1944, and this schedule recites the purchase, the acquisition of 2710 Baker Street, the liability incurred, subsequent payment thereon by the taxpayer, the rentals collected during 1943 by her attorney, Mr. Heyman, as her agent, and applied by him in the net amount after the expenses of the apartment operation for any one month had been paid to the principal of the mortgage which he held. [203]

* * * * *

Mr. Marcussen: I think they should be identified.

The Witness: So the summary of the statement which appears on its face is the total capital on taxpayer's liability, the total income received, the total expense allowed against that income. Well, that is all.

Q. (By Mr. Marcussen): Now, is the material that is presented on that included in statements which have been prepared by you on Respondent's Exhibits J, K, and L? A. That is correct.

Q. That material was used in the preparation of those three? A. That is right.

(Testimony of Paul W. Tormey.)

Q. And those three statements were prepared by you? A. Yes, sir.

Q. Will you state what is the source of material that you used in compiling this information on this two-page spread which we have been talking about?

A. As to the year 1943 which is Page 1, it is based principally upon a statement furnished the Intelligence Unit by Mr. Maurice Heyman, the attorney for the taxpayer, in which he makes a month-by-month running report of the rents collected, the expenses paid, and the balance applied to the contract, and, in addition, he cites the interest charges accruing on the balance, and acknowledges any direct payments of cash [204] which the taxpayer may have given him.

In most instances where direct payments of cash occur, they were covered by the taxpayer's check and therefore appear in their books, but, in some cases, she applied cash, some of which is on her normal business book records, some of which is not. Therefore, this is a fundamental support of the 2710 Baker Street property submitted by the taxpayer.

Q. Now, speaking again about this second group of papers submitted to you by Mr. Heyman, will you tell how they came into your possession, whether or not they came into your possession at the request of the Intelligence Unit.

A. As I recall it, they were turned over to me by Mr. Krause as part of the papers that had been acquired by the unit at the time I took over the

(Testimony of Paul W. Tormey.)

case, but, as I understand from reading the summation, they were submitted voluntarily by Mr. Heyman. It was his own idea that they be given to us.

Q. Do you have a further explanation to make with respect to the year 1944, covering the schedule?

A. The same general details as described in the year 1943 appear on Page 2 for the year 1944; however, the taxpayer completed payment on the mortgage on the property by August 15, 1944, and thereafter collected the rents directly, and disbursed the expenses in connection with the apartment house directly, and, in some instances, these are recorded in [205] her books, the black book that we have in evidence, and in some instances they are not, but her checks cover these, some of these expenses, and in some cases they do not.

Q. So that on Page 2, covering the year 1944 on this schedule of rentals, to the extent that they are not covered by information submitted by Mr. Heyman, they are covered by information obtained from the records of the taxpayer, either books of account or cancelled checks?

A. That is correct.

Mr. Marcussen: I will offer the rent schedule as Respondent's exhibit next in order.

* * * * *

The Court: Is there any objection?

Mr. Crittenden: None.

The Court: Exhibits O and P in evidence.

(Testimony of Paul W. Tormey.)

(The documents referred to were marked and received in evidence as Respondent's Exhibits O and P.)

Q. (By Mr. Marcussen): Now, referring to Exhibits O and P in evidence, do [206] you have a further explanation you wish to make?

A. I would like to suggest that that be identified as operating statement of the Baker Street property, rather than rental statement, because we never had a statement of the gross rent.

Q. We will characterize that in that manner.

Now, I hand you Respondent's Exhibit J and ask you to state briefly what that is and whether you prepared it.

A. Yes, sir, I prepared this schedule in May of 1946, as an Application of Funds Statement. In other words, it reports the application of all money spent by the taxpayer or applied to the acquisition of an asset for the disbursement for a business expense or a personal item, and it also sets forth all identified sources of funds received by the taxpayer, including those reported on her returns, identified "Amount of Rental Income," the income from interest credited to her savings account.

Q. Now, what is the purpose of a statement of source and Application of Funds?

A. It is to show that all moneys known to have been spent by taxpayer in this case have been adequately accounted for, either as reported income or identified as loans or other source.

Q. Do the statements in this case show that all

(Testimony of Paul W. Tormey.)

of the funds were accounted for by this taxpayer?

A. They do not.

Q. Was there an understatement for the year 1942? A. Yes.

Q. In what amount?

A. In the amount of \$7,214.13.

Q. How about 1943?

A. An amount of \$17,030.71.

Q. 1944? A. \$22,596.49.

Q. Now, I would like to have you identify the columns for each year by number which contain the material pertaining to the statement of source and application of funds.

A. Funds applied during 1942 appear in column 2; funds realized, or source of funds, appear in column 3. For the year 1943, funds applied appear in column 5, and funds realized appear in column 6. In 1944, funds applied, column 8; funds realized as column 9.

Q. Now, taking the year 1942, I call your attention to the first item in column 2, which appears to be \$748.55, Bank of America, and ask what is the significance of that item in that column.

A. Correction. Bank of California.

Q. Thank you.

A. And it happens to be the ending balance remaining in the taxpayer's account after allowance for any outstanding [208] checks as of December 31, 1942.

Q. And I will ask you, then, calling your attention to the next item, the Morris Plan Company,

(Testimony of Paul W. Tormey.)

in the amount of \$1109.23, and ask the significance.

A. That is the year-end balance remaining to the taxpayer's credit.

Q. And the next item, \$3041.68, merchandise inventory.

A. That is the year-end merchandise inventory.

Q. Now, the next item is Investment in Tavern.

A. That is the balance of—that is the total funds applied, by my calculations, during the year.

Q. Now, I call your attention to the fact that the actual amount expended in 1942 for the tavern was—I will withdraw the question and ask you whether, in interpreting this statement, there is any other item in column 3 that should be used in connection with that?

A. Yes, sir, under column 3 there is an item of \$1,000, and that is deducted from the investment in tavern, because it represents the inventory value agreed to by the taxpayer as of July, 1942, and consequently affects the computation of income and cannot be carried in the asset account.

Q. Is there another item in the "Funds Realized" column that should be used in connection with the item of Investment in Tavern? [209]

A. Yes, sir. I have an offsetting item of \$650. May I explain how that arose?

Q. I wish you would explain it by way of my questions, Mr. Tormey. I will just ask you the difference between the \$650 appearing in column 3 and the \$2300 appearing in column 2. That is \$1650, is it not?

A. That is correct.

(Testimony of Paul W. Tormey.)

Q. So that the net effect of this would be exactly the same as if \$1,650 had been entered in column 2, instead of the \$2,300 and no item had been entered of \$650 in column 3.

A. That is correct.

Q. Would you explain why you happened to treat that in that manner, instead of putting in the net amount, the amount of \$1650?

A. Yes, I will.

Q. Go ahead.

A. The taxpayer testified and her records show that she paid \$1650 for a one-half interest which had previously been owned by Mr. Victor Divers. She thus became the full owner of the tavern, and my computation reflected that, if one-half interest was worth \$1650 the other half-interest was worth the same, but she had only paid \$1000, so there was an appreciation in investment, and for the purpose of the net worth statement that was shown in the valuation and offset by what you might term a revaluation surplus of \$1650. It is [210] a non-taxable item, and disregarded for income tax purposes.

Q. Now, is the procedure that you followed with respect to that item the one commonly followed where the purpose is to prepare a net worth statement?

A. That is very common in the banking and commercial world, but not common in the Revenue Department, and should not have been handled in that way.

Q. Was the \$650 shown as a credit in Item 3—

(Testimony of Paul W. Tormey.)

was that included as an income item on the deficiency notice for the year 1942?

A. It was not.

Q. Now, then, I call your attention to the next three items appearing in Column 2 entitled "Booths." What is the significance of that item in the "Funds Applied" column?

A. It was a purchase made by the taxpayer in the tavern, which is a depreciable item, not an operating expense, and therefore set up as an asset.

Q. Showing, therefore, that she applied either cash or credit to take care of—to acquire those booths in that year?

A. That is correct.

Q. Now, is your answer the same with respect to the next item of \$1,066.79 entitled "Draperies and furnishings"?

A. Yes, that happens to be the Lachman furniture account, and it is in part represented by cash payment for the [211] purchase of the merchandise and in part by an offsetting liability to Lachman Bros. for contracts entered into before the end of the year.

Q. In fact, in an identical amount in column 3, showing as a liability?

A. That is correct.

Q. And while we are talking about the liability, then, in column 3, what is the significance of that?

A. Credit is given for the purpose of the statement to any increase in the liability.

Q. In other words, it merely shows the acquisition of an asset by means of that credit?

(Testimony of Paul W. Tormey.)

A. That is correct.

Q. Then is your answer the same with respect to "Unidentified Loans" in the amount of \$300 appearing in column 2?

A. Yes, I may explain that "Unidentified Loans" is taken from the taxpayer's records. This item of \$300 appears in her cash book. May I add something to that? After discussion with the taxpayer, a credit appears in the subsequent years to bad debts; in 1943 for \$150; and 1944 for \$150, so that while this asset is set up in the beginning year, it was written off in an orderly fashion on losses never repaid, some of them were being talked about yesterday.

Q. And she was given credit for that?

A. That is correct. [212]

Q. Now, that completes the items in column 2 which are identified as assets, and then there appear certain entries under the title "Liabilities," and I call your attention to the item of \$174, B. T. Brilliant Company, Jewelry, and ask you what is the significance of that item in that column?

A. That is payment of an outstanding liability from the previous year. The record will show she was indebted to the B. T. Brilliant Company in that amount as of December 31, 1941, which was paid off in full during 1942.

Q. The next liability item entered in column 2 under "Funds Applied" is \$203.01 from Lachman Bros., and I ask you what is the significance of that?

(Testimony of Paul W. Tormey.)

A. \$28.01 of it applies on liability similar to the Brillinat one we have just discussed from 1941 and \$175 issued on December 31, 1942 was a down payment of a total contract of \$1,066.79 entered into by the taxpayer at that time, which we just discussed as drapes and furnishings.

Q. Representing a partial payment by the taxpayer to Lachman Bros.?

A. A partial payment, yes.

Q. For the purpose of "Source of Application of Funds Statement," does it make any difference whether the liability paid existed previously or was incurred during the year?

A. No, by way of identification. [213]

Q. Then, is your answer with respect to the next two items, Morris Plan Company and Pacific Finance Company, the same as it was with respect to the previous item?

A. Those are total funds applied, either against pre-existing liabilities or current transactions during the year.

Q. Now, the next item below that appears opposite the title "Net Worth" in the amount of \$10,-945.36.

A. That is the total of all the items in column which we have just discussed which apply to accounts which have been identified as asset account.

Q. Now, beneath that total there appear other items under the general heading, "Income and Expense Items," the first of which is "Net Cost of Goods Sold" in the amount of \$7,051—I beg your

(Testimony of Paul W. Tormey.)

pardon—\$7,518.78. Will you explain the significance of that item?

A. That is the net cost of goods sold as identified. It is arrived at by taking the taxpayer's beginning inventory, adding to it her purchases, deducting the year-end inventory, and that is the net cash applied for cost of goods during the year.

Q. Is the item of \$3,041.68 appearing under "Merchandise Inventory" as the third item in column 2 the ending inventory to which you refer?

A. That is correct.

Q. Then the net effect of the item, the \$7,000 item [214] for net cost of goods sold is to reflect that that is the amount that was spent by the taxpayer during that year, for merchandise, is that correct.

A. That is correct.

Q. That is merchandise actually a deductible item?

A. That is correct.

Q. There follow salaries and wages in the amount of \$1,990; taxes on business \$934.81; rents, repairs, and other expenses, \$917.32, and I ask you to state what that represents?

A. Those are all items of funds applied as you have just identified, and are the totals of such items which appear in the taxpayer's cash book or her checks.

Q. Then, under the heading "Deductions," there are two items, contributions in the amount of \$25.00; interest in the amount of \$73, and I take it those are expenditures representing those items, is that correct?

(Testimony of Paul W. Tormey.)

A. Yes, sir, in the case of the interest it was applied by being included on the credit to the Morris Plan Company. It was not a cash expenditure. It was a debt paid to interest, charged by the Morris Plan Company.

Q. Show me the item of interest that you are referring to.

A. The Morris Plan Company account shows \$73 in interest applied on this loan of the taxpayer during the year.

Q. On this schedule in column 3, does the liability [215] appear to the Morris Plan Company in the amount of \$1,200? Is that what you are referring to?

A. Not a liability in itself. It reflects the receipt of the money on the liability.

Q. Then there follows an item under the general heading, "Personal Account," \$935.98, which is for personal expenditures, and I presume that is what it purports to be.

A. That is right.

Q. And then there is an item of \$167.50 under "Admitted Gambling Losses."

A. Those are the items admitted by the taxpayer in the part referred to yesterday in her examination, that she identified in conferences with the agent as definitely being gambling losses, and they are supported by her own checks or entries to cash in her black book.

Q. They do not include, do they, those gambling losses listed in the books as donations to charity?

A. In part they do, in 1942, yes.

(Testimony of Paul W. Tormey.)

Q. In part they do? A. Yes, sir.

Q. Well, then, is the significance of that item that she has been allowed those gambling losses?

A. No, sir. This is simply a source and application of funds to arrive at any amount.

Q. They were disallowed later? [216]

A. That is correct.

Q. Then the next item is \$2400 appearing there as living cost and that purports to be her own estimate of what she spent for living expenses?

A. That is correct.

Q. Completing the sum total of \$25,907.75. And that, I take it, represents the total amount of money that was applied and spent by the taxpayer during that year, is that correct?

A. It has to be qualified to this extent, that it is the total of money spent or credit applied. The year-end balance, beginning and ending balance, only are taken into consideration, because the other ins and outs are actually applied to the other items appearing on the statement.

Q. Now, we come to column 3. There are a few items that I would like to have you explain their significance. In column 3 the first item of \$863.79, appearing as a credit under Morris Plan Company, and it is on the same line with the corresponding debit in column 2 of \$1,148.23. I believe you testified that the latter figure of \$1100-odd was the ending balance in her Morris Plan account?

A. That is right.

Q. Now, do you take it that the \$863.79 shown

(Testimony of Paul W. Tormey.)

in column 3 shows that \$863.79 of the ending balance of \$1,100-odd is accounted for by the existence of an opening [217] balance in that account of \$863.79?

A. You can deduce that, and that is correct in this instance.

Q. And the next item in column 3 is the \$1,000 item appearing as a credit under "Investment in Tavern"?

A. That represents the transfer of part of her check charged to the tavern to inventory account.

Q. Inventory? In other words, it is based upon her testimony, as I understand it, that she agreed that approximately \$1,000 of the amount of \$1,650 that she expended for the remaining half-interest in 1942 was for a payment of inventory?

A. That is correct.

Q. And was that \$1,000 included in the item which you have testified to on cost of goods sold, in column 2, in the amount of \$7,518.78?

A. That is correct, the first item in that computation, the beginning inventory, \$1,000, then the closing inventory of \$3,041.68, was subtracted and the net amount of goods sold resulted.

Q. Take next the item of \$1,066.79, and I ask you what does that represent?

A. That represents the total credits; in other words, liabilities assumed by the taxpayer for the purchase of materials or carrying charges at Lachman's during the year [218] 1942.

Q. And it was with that credit that she received

(Testimony of Paul W. Tormey.)

assets that are accounted for in column 2, is that correct? A. That is correct.

Q. Will you state what is the next item, \$1,200, appearing under Morris Plan Company loans?

A. That represents cash received in the amount of \$1,200 during the year.

Q. Under the designation "Net Worth" appears a total item, "\$4,130.58, and I ask you whether or not that is the total of all items appearing above that? A. That is correct.

Q. Then under income and expense items there appears an item, "Spouse's salary while married" in the amount of \$965, and I ask you to explain what that is?

A. The taxpayers reported on their joint return as total amount of \$1,380 and in fairness to the taxpayer, only the amount which Mr. Jost was known to have earned during their marriage was set forth in here as identified funds. We considered that it was possible that every penny of that salary of Mr. Jost may have been turned over to acquire these assets or pay these expenses.

Q. When you say, "Every penny," you mean every penny of the difference between \$965 and the total amount earned during the year? [219]

A. No, I mean the \$965 not earned while he was married to the taxpayer. The amount earned while single cannot be applied to the assessment.

Q. Is the \$965 the amount earned while married to the taxpayer? A. While married.

Q. Then, for the purpose of this statement, you

(Testimony of Paul W. Tormey.)

have assumed in her favor that all of her husband's salary was used by her in the business to account for the acquisition of some of the assets and the incurrence of some of the expenses appearing in column 2?

A. Payment of expenses, yes, sir.

Q. Then the next item is, "Income from partnership," \$2,116.05.

A. That is the Victor Divers and Catherine O'Connor partnership, reported by them for the year 1942 and all of it was credited here as having been available to the taxpayer for the acquisition of these assets or for the payment of liability and expenses.

Q. Just a moment. Is that Mrs. O'Connor's one-half? Does that represent the distribution of Mrs. O'Connor's one-half share in the profits of the partnership for so long as it existed in 1942, to July 15, 1942?

A. Yes, it is the amount of partnership income she reported on her own return as having been received during the [220] year.

Q. Then the next two items are items for interest and rent, and I take it that they are merely items of income that have been reflected for those accounts, is that correct?

A. The item of \$22.44 is interest credited by the Morris Plan on Thrift Account which we talked about in the asset section.

The \$363.00 is the net rental income determined for the taxpayer for the year 1942.

(Testimony of Paul W. Tormey.)

Q. Is that after the allowance of the deductions for operating expenses of her own property—property she owned and the property she rented?

A. Yes, it is. That is the theory, but, in this case, the year 1942, the only rents the taxpayer was collecting were on the apartments over her tavern.

Q. I beg your pardon. I will withdraw the question. She didn't own any property during that year.

A. Yes, and expenses on the apartment were commingled with business expenses, if there were any allowed in business deductions, and there are no deductions from gross rents received for the year 1942, as such.

Q. The next item, \$10,506.55, what is that item?

A. That appears on the taxpayer's return, gross business receipts for the year—for the period July 16 to December 31. [221]

Q. In other words, the receipts she admitted receiving?

A. Reported receiving.

Q. Then next is \$650, appreciation on tavern investment, and I think you testified on that already.

Then the next item is unidentified income, \$7,-214.13, and I will ask you what that is?

A. That is the difference between the total of funds applied, which we discussed in column 2 and the total of all other items in column 3, which we have discussed. That is the figure necessary to bring column 3 into balance.

Q. In other words, is it correct to conclude, then, that in order to have made or acquired the

(Testimony of Paul W. Tormey.)

assets, and made the expenditures that are listed here and identified in column 2 as funds applied, she would have to had in her possession either cash or credit in the total amount of \$7,214.13, in addition to the items that we have just identified in column 3? A. That is correct.

Q. Now, then, I don't want to go through all of these items that appear on the funds applied and funds realized columns for the years 1943 and 1944, but I will just ask you whether or not the entry of those items and the computation of the additional cash income which you have computed for those years has been computed on the same basis and in the same manner as you have just testified to with respect to [222] 1942?

A. That is entirely correct.

Q. Now, I wish, however, that you would glance over the year 1943 and ascertain whether there are any particular items that need particular explanation.

A. I notice that you were introducing in evidence the Heyman records which will explain the acquisition of the land and buildings identified as 2710 Baker Street property and the item of \$17,000 which appears in column 5 as a debit.

Q. Now, I refer you to Respondent's Exhibit K which is an income statement which you prepared for the years 1942, '43, and '44, and I will ask you to state generally what the source of the material is from which that statement is prepared.

A. I would like to first state what it sets forth

(Testimony of Paul W. Tormey.)

and then I will give you the source of it. The information on this schedule is based on the return of the taxpayer, the corrections determined by our investigation, and the resultant corrected income or expenses, as the case may be.

Q. Now, when you are talking about corrected items, are you referring to corrections that were identified and agreed upon with the taxpayer or her attorney?

A. In general, those items, if there was any question in our minds as to the propriety or chance, if we felt that the taxpayer should be given an opportunity to explain the circumstances of any item they were explained; other normal [223] errors found in the books and records which we consider technical adjustments were made without advice to the taxpayer. They are minor amounts, however.

Q. Then the items appearing here are based upon an audit of her books and records, and they are also based upon these sworn statements, material received by the taxpayer and submitted to the Intelligence Unit in these sworn statements of her attorney?

A. That is correct.

Q. That is what I am getting at.

Now, I call your attention to the item appearing under the designation "Total Receipts" in column 3 of this statement which is headed "Increases and Decreases," and the item \$7,214.13, and ask you whether that is the difference between the item of \$10,506.55 disclosed by the taxpayer's return and

(Testimony of Paul W. Tormey.)

the total item of \$17,720.68 which you have used as the corrected amount of her gross income.

A. That is correct.

Q. Now, that is the same amount, is it not, that appears as the difference computed on Respondent's Exhibit J for the year 1942?

A. That is correct.

Q. And similarly, you have used for the year 1943 on Respondent's Exhibit K an item of \$17,-821.99, and for the year 1944—I beg your pardon—for the year 1943, that was correct, was it not?

A. That is right.

Q. And for the year 1944, an item of \$22,296.49, and ask you whether those items are the same items appearing on Respondent's Exhibit J for the corresponding years?

A. That is correct.

Q. Now, referring to columns 10, 11 and 12, I will ask you to state briefly what they are.

A. Column 10 sets forth the total of any item on the schedule, either income or expense for all of the years 1942, 1943, and 1944, as disclosed by the taxpayer's return.

Column 11 sets forth the totals corrected by the Bureau and column 12 sets forth the net decrease or increase in any particular item for the entire period.

Q. Referring you to column 12, under the heading "Total Receipts," I will ask you what is the significance then of the item of \$47,632.61.

A. It represents additional business income de-

(Testimony of Paul W. Tormey.)

terminated by our investigation in the amount of \$47,632.61; that is gross receipts only.

Q. Which the taxpayer failed to report?

A. That is correct.

Q. For the three years?

A. That is right.

Q. Now, at the foot of this schedule, you have drawn [225] a double line, and you have a statement, "Adjusted Net Income." May I call your attention to the fact that the adjusted net income—well, I will just ask: What is adjusted net income for each of the three years?

A. In all of the categories?

Q. No, the adjusted net income for each of the three years.

A. The corrected net income is adjusted for the year 1942, which appears in column 2 of this exhibit, amounts to \$10,044.26; for 1943, which appears in column 5, \$21,821.05; for 1944, \$30,571.66.

Q. And will you state, under "Adjusted Net Income" whether or not you have given—what the differences are for each of the three years under the heading "Adjusted Net Income", and let the record show that I am speaking from Exhibit K.

A. For the year 1942, the additional income, which means the difference between the corrected income, \$9,266.97; for the year 1943, \$13,941.77; for the year 1944, \$25,479.68.

Q. And what was the total for the three years?

A. \$48,688.42.

(Testimony of Paul W. Tormey.)

Q. Now, I hand you Respondent's Exhibit L and ask you to state what that is?

A. That is a comparative statement of taxpayer's assets, liabilities and net worth for each of the years involved in this investigation. [226]

Q. What does it show for the increase in net worth for each of the taxable years involved here, and identify the column and line, please.

A. The heading "Net Worth" appears on line 36 of this Exhibit L, and the first year, in column 3 of the schedule for the year 1942, amounts to \$6,164.78. For 1943, that appears in column 6, and the increase in the taxpayer's net worth during that year was \$13,183.91.

The increase during 1944 which is set forth in column 9 amounts to \$15,329.89.

Q. What is the computation showing the total increase in net worth for the period?

A. \$34,678.58.

Q. Now, referring back to government's Exhibit J, I will ask you whether or not, in addition to the various columns showing a statement of source and application of funds, you have opening and ending balances for the various accounts of the taxpayer for each one of the three years.

A. I have, to the extent of assets and liabilities, which result in net worth shown on line 33 of that statement.

Q. Have you computed on that schedule the increases in net worth?

(Testimony of Paul W. Tormey.)

A. They are set forth in 12, for each of the years.

Q. I notice that there is a difference between the increases in net worth, as shown on that statement, Respondent's [227] Exhibit J, and the increases in net worth shown for the respective years 1943, 1944, and also 1942, on Respondent's Exhibit L. Will you state what the difference is?

A. The only difference is the amount of \$650 which, in Exhibit J, has been explained as an overstatement of the taxpayer's assets by recording appreciation under tavern investment, so in each of the years the amount of the increase will be \$650 overstated, and that is the only difference.

Q. That is for income tax purposes?

A. Yes, sir.

Q. And I think you testified that \$650 did not enter into—was not credited or charged to her as income received in that year, and therefore would not increase her actual net worth for the purposes used in this audit.

A. That is correct.

Q. Then the correct net worth figures, to summarize, appear on which one of these two statements?

A. The latter one, Exhibit L.

Q. The lesser amount?

A. That is correct.

Q. Now, I hand you Respondent's Exhibit M and ask you to state what that is?

A. That is in detail a summary of the funds applied by the taxpayer, and the source of those funds and the unexplained differences we have al-

(Testimony of Paul W. Tormey.)

ready described in the schedule. I say [228] that it is a customary because, in some instances, the items appearing on this detailed statement, which is detailed by item, are the total of some of the items appearing.

Q. In other words, this is a summary of the source and application of funds columns appearing on Respondent's Exhibit J?

A. That is correct.

Q. And comes around to the same net figures, but you have got certain subtotals representing groupings of certain items?

A. That is correct.

Q. I would like to have you refer to the deficiency notice in this case.

Now, referring to Respondent's Exhibit L which is the net worth statement, I notice at the foot of the page, you have certain entries under the general heading, "Adjustment to Net Worth Increases."

Well, it is adjustment to net worth increases, and then you have certain items reflecting additions to the net worth, and I ask you to state briefly what those are?

A. Yes, the net worth increases which I have testified to are the actual increases in the taxpayer's net worth, but for income tax purposes there are certain items which are not reflected either in her books or in the net worth statement which must be considered in this case. [229]

They consist, in the year 1942, of recorded personal expenses of \$935.98. The gambling losses we

(Testimony of Paul W. Tormey.)

have already testified to and the living costs we have already testified to in the amount of \$2,400, so that there were a total amount of increases of \$3,503.48 and, in addition, the spouse, Mr. Jost, earned a salary, while single, which was reported on the return and had to be accounted for—not reflected in the taxpayer's cash, but had to be accounted for—an amount of \$415. That is the difference, you recall, between the \$965 used on the application of funds statement and the total amount that appears on the return, of \$1,380; then a non-cash item of appreciation which would not be reflected.

Q. Just a moment. What are the total items then of that character, which you added to the net worth, in an effort to ascertain the net?

A. \$3,918.48.

Q. And did you make certain deductions?

A. Yes, sir.

Q. In the year 1942 what was the deduction?

A. A single one for depreciation in her business expense. It is a non-cash item, not claimed by the taxpayer, but allowed, deducted for depreciation, \$39.00.

Q. What was the depreciation on?

A. Six months on the furniture and fixtures in the [230] tavern which the taxpayer, in subsequent years, identified as costing \$780 and subject to depreciation of 10 per cent.

Q. Resulting in a total added to the net worth

(Testimony of Paul W. Tormey.)

increase of \$3,789.48, and adjusted net income of \$10,044.26.

A. That is correct.

Q. Now, I will ask you whether that is the same amount which is computed on Respondent's Exhibit K as the corrected net income for the year 1942?

A. Yes, it is. It appears on Line 50.

Q. Are the amounts computed, then, for adjusted net income on schedules K and L as adjusted net income of the taxpayer for each of the years involved the same?

A. That is correct.

Q. Now, for the year 1942 you testified that that is \$10,044.26, and I ask you whether that is the same amount shown on the deficiency notice for the year 1942.

A. That is correct. I am looking at it.

Q. And is the amount the same for each—is the adjusted net income computed on those schedules the same as it is on the deficiency notice for the years 1943 and 1944?

A. That is correct, with the exception of the year 1943, you will have to restrict it to income tax net income.

Q. Yes. Now, calling your attention to the year 1942, computation in deficiency notice, specifically to an item, decrease in personal deductions, \$54.50, will you state what [231] that is composed of? Do you have the papers which you need to answer that question? Here is the deficiency notice. I call your attention to the item \$54.50. Can you testify as to

(Testimony of Paul W. Tormey.)

the item of \$54.50 added into income as a result of decrease in deductions claimed on the return?

A. That is correct, the taxpayer's return for the year 1942 claims a deduction for contributions in the amount of \$152.50. The corrected amount of these contributions was determined to be \$25, requiring a disallowance in the amount of \$127.50.

On the other hand, the taxpayer failed to claim a deduction for interest paid to Mr. Heyman, or to Morris Plan—I cannot recall at the moment—in the amount of \$73, which reduced this disallowance to a net amount of \$54.50. That would be Morris Plan interest, because the Heyman contract was not entered into until 1943, and it will show on the Morris Plan exhibit in the record.

Q. Returning to the year 1943——

A. Before I complete that answer, Mr. Marcussen, did you wish the detail of those contributions and the reason they were disallowed? I am able to give you that. I have testified that contributions claimed by the taxpayer were \$152.50 and there was allowed only \$25, a difference of \$127.50.

Q. And that refers to what? [232]

A. It refers to items labeled "Red Cross," "U.S.O." and similar matters.

Q. The items to which Mrs. O'Connor testified?

A. Yes, sir.

Q. Did you have anything further to add?

A. I can give you exact detail.

Q. Now, turning to the year 1943, please take a look at the deficiency notice for 1943. I will let

(Testimony of Paul W. Tormey.)

you use the copy that was attached to the petition, and I call your attention to the first item appearing there, \$791.28, and ask you to state what that is?

A. That is sales tax taken by the taxpayer on her return as a deduction from gross receipts.

However, in confirming the amount of this sales tax with the State Board of Equalization, we found that it was allowable in greater amount and accordingly allowed the greater amount in her taxes on business, where it should properly be claimed, and increased her business receipts to properly reflect the total receipts actually received.

Q. Those total receipts actually included the amount she collected as taxes?

A. That is correct. I would like to give you the amount of taxes actually allowed, so the taxpayer will know.

Q. Does that item appear on any of these exhibits that you testified to earlier this morning, Exhibits J, K, or L? [233] If it does, please refer to that?

A. Yes, it does appear on Line 25 of Exhibit K, entitled "Taxes on Business" for the year 1944.

Q. '43, we are talking about.

A. '43, pardon me. For the year 1943, taxes claimed by the taxpayer amounted to \$1,112.24 which you will note we have increased by the amount of \$935.99, for a total corrected tax allowed the taxpayer in that year of \$2,048.23; sales tax, \$872.99 in that amount. There are additional details I can give you.

(Testimony of Paul W. Tormey.)

Q. What is the difference between the \$800 figure you just gave and the \$935.99?

A. I will get it for you. We allowed her additional tax on the pinball machine in the amount of \$19.25, and deducted that as to old age benefits and Social Security in the amount of \$1.75.

Q. Then this item, \$791.28, as it is shown as an item of increasing the income, increases it in that amount and allows it in a greater amount in a different place, in its proper place?

A. That is correct.

Q. Now, you have allowed for 1943 an increase in business expense of \$3,887.05 on the deficiency notice, and I ask you whether you can explain that?

A. Yes, sir. [234]

Q. On Line 31 of Schedule K you will find a total business deduction for the year 1943, as disclosed by the taxpayer's return, \$22,493.40. As corrected, they were \$26,380.45, or reflecting an additional business expense allowed in the amount of \$3,887.05.

How were those additional expenses determined by you? I am just asking you how, the method, now?

A. By comparison of the amount claimed on the returns with the information disclosed by the taxpayer's black book in evidence, or her check stubs or supporting details such as the Heyman statement would, in this year.

Q. After an audit of her books from her books and records, also from conversations with her?

(Testimony of Paul W. Tormey.)

A. Oh, yes, admissions by the taxpayer's sworn statement.

Q. Let's not say "admissions,"—claims by her that you allowed, is that correct?

A. Yes, indeed. This was all in her favor.

Q. Now, turning to the year 1944, Mr. Tormey, I call your attention to an item of \$519 appearing as "Income from Rent Understated," and ask you whether or not the data from which that figure is computed is already presented in other exhibits which have been introduced in evidence here.

A. Specifically that rental schedule which was introduced this morning—the gross rents will be reflected on the [235] rental statements which are in evidence and schedule K here, also receipts are set forth on Exhibit K.

Q. Are they reflected in Respondent's Exhibits O and P? A. In part.

Q. Well, do you have a breakdown of the figure, exactly how that was computed?

A. Yes, sir.

Q. Will you give it then, please?

A. Rental income from 597 Valencia Street, where the statement was admitted in evidence.

Q. Is it one of the exhibits?

A. That is right.

Q. I will produce it.

A. I think it is No. 23.

Q. I hand you Sub-exhibit 26 of Exhibit 5, offered in evidence here, and ask you whether the information contained on that exhibit—

(Testimony of Paul W. Tormey.)

A. Yes, at the bottom of the page under the year 1944, items of rent for each month of the year are set forth in columns under the headings "Apartment No. 2, 1, or 4," as the case may be, and the total amount, \$1228, which has been approved by the taxpayer.

Q. As her rental income from——

A. 579 Valencia Street.

Q. All right, what other figures? [236]

A. The Baker Street property appears on the schedules just submitted this morning.

Q. Exhibits O and P?

A. That is correct.

Q. And you got your total gross rents, then—they are reflected in those schedules?

A. That is correct.

Q. Then, go on with your explanation of how you get down to the disallowance or the increase in income of \$519?

A. The amount of rent collected from 2710 Baker Street, as shown in the evidence, is \$1,775, so that those two together would have totaled \$3,003. However, the taxpayer reported the total rent received on Baker Street as \$2,484 and \$709 of that had to be transferred to the year 1943 because I determined in my audit that that is what the report covered, the acquisition from the time the property was acquired by the taxpayer to the end of the year 1944, so she was actually attempting to report more income in the year than she was charged with, so we reduced the income \$709 and

(Testimony of Paul W. Tormey.)

increased 579 Valencia Street, \$1228, making net rental income of \$519 not reported.

Q. Now, continuing for the year 1945, from this copy of the deficiency notice which is attached to the exhibit, I will call your attention to an item of \$218.03, and ask you whether it is necessary to make a mathematical correction [237] there?

A. Yes, there is a typographical error on the deficiency notice of 90 cents, I believe. The correct amount is \$218.93.

Q. And will you explain how that amount is computed? It is identified on the deficiency notice as "Increase by Overstatement of Repairs, Schedule G."

A. This adjustment corrects the net overstatement of repairs to the taxpayer's frame apartment house at 2710 Baker Street, San Francisco, as detailed in Schedule C of her 1944 return. The corrected figures are as follows: Do you want the details?

Q. Just explain it.

A. Paper and painting, reported as \$860.52, corrected to a greater amount of \$913.97, or an increased deduction of \$53.45.

A heating system repaired was claimed by the taxpayer on her return in the amount of \$301.75 which is entirely unallowable as a business deduction because it is a capital item purchased and subject to depreciation along with the life of the building, so \$301.75 was disallowed in that category.

Then we allowed Miscellaneous Repairs that the

(Testimony of Paul W. Tormey.)

taxpayer did not claim but was revealed by an audit of the books, \$29.37, so if you add the increased allowance of \$53.45 on papering and painting and the miscellaneous repairs [238] \$29.37 together, and subtract them from the disallowed water heater, \$301.75, you will have \$218.93.

Q. Then the next item is a disallowance of \$510.23, as identified on the deficiency notice for the year 1944, Schedule B, increased by one-fifth depreciation, repairs and other expenses of apartment house used as taxpayer's residence.

Will you give your explanation on that?

A. The amount represents that portion of the adjusted expenditures allowed the taxpayer in Schedule B of her return as a deduction from rental income which is properly chargeable to her as cost of her personal residence, under the regulations. The 2710 Baker Street apartments had five units with the following OPA ceiling at that time in effect. Do you want those details?

Q. No, I don't think we need to go into those.

A. No. 1 was \$37.50; No. 2, \$30.00; No. 3, \$30.00; No. 4, \$55.00, and No. 5, \$55.00.

Now, Mrs O'Connor occupied No. 5 from February, 1944 through December, 1944. This adjustment applies one-fifth of the total depreciation for repairs and other expenses as her personal expense.

Q. By virtue of her occupation of the apartment?

A. The point in stating the other rentals is that actually she should have been charged a greater

(Testimony of Paul W. Tormey.)

proportion [239] because she was occupying one of the more expensive apartments in the building and should have borne a greater percentage than the one-fifth allowed. I might add that a deduction will be allowed in her personal schedule for the amount of interest and taxes disallowed in this adjustment. She is also entitled to a full deduction for interest and taxes.

Q. Now, can you give an explanation of the decrease in item identified as a decrease in cost, in the amount of \$3,936.32?

A. Yes, I can. It has to do with the cost of taxpayer's merchandise sold, cost of goods sold. May I see the item again?

Q. I beg your pardon. It shows a net amount of—well, that is the total. I am talking about the item of \$3,936.32.

The Court: The next item below the \$510.23 on the statement of deficiency notice and, as a result of some adjustment, cost of goods sold, rent, repairs and other expenses.

Q. (By Mr. Marcussen): Can you give a detailed explanation of what goes into that, the make-up of that item? A. Yes, sir.

Q. I call your attention to the fact that, in the [240] column to the left of the column in which that item appears, there are several computations there, finally arriving at this figure, \$3,936.32. Now, returns are here. Would you like to use her returns for the purpose of your explanation?

A. No, I have the details set forth here, but you

(Testimony of Paul W. Tormey.)

are asking me specifically about this one item. I want to make it clear whether you want me to go over this whole thing.

Q. Well, Mr. Tormey, that appears, it seems to me, as the total, the net adjustment from several other adjustments appearing in another column. Now, can you give the details to the court as to how that item is computed?

It says "Add Decrease in Cost." Now, are you prepared to do that at this time, or would you prefer to do that a little later, make a computation and come back later?

A. Well, I have all the information.

The Court: Well, can you give it?

The Witness: I will have to go right back.

Q. (By Mr. Marcussen): Would you like to be recalled for that? Are you prepared to give that now? A. Just as you wish.

Q. The question is: Are you prepared to do it now, or would you rather study your papers?

A. I can probably expedite my testimony.

The Court: Can we move on to other items?

Q. (By Mr. Marcussen): We will move on and give you an opportunity to do that.

Then there is an item, "Add Decrease in Contributions Claimed, \$481." Now, I will ask you whether or not that is based on the items entered into the books as donations for various charges which Mrs. O'Connor testified constituted gambling losses and other items not what they were stated to be in the book.

(Testimony of Paul W. Tormey.)

A. Yes, I can explain it. The adjustment corrects the net overstatement of deductions on the 1944 return, standard deductions of \$500 were claimed by the taxpayer and had to be disallowed because audited deductions set forth and itemized such as interest, taxes, and losses exceed \$500.

Moreover, the standard deduction was claimed incorrectly by the taxpayer because she had already included deductions for charity in the amount of \$586.50 on her business schedules and that is included in the total rent, repairs and other expenses under Item 17 of 1944 return, Schedule C.

Q. In other words, the items for charity which she claimed are included under business deductions on the return for 1945? A. That is right.

Q. And as respects this particular deduction, the [242] standard deduction of \$500 per return, that is the amount reported by the taxpayer and we corrected that to \$19.00 of regular contributions in the statutory deductions, and the difference there is \$481.

Q. So she was allowed a small item of \$19 as a contribution, and the rest was disallowed on the basis of her statement to you that they did not constitute these contributions to charity as indicated by her. Is that correct? A. That is correct.

Q. Did you state that the standard deduction was claimed and disallowed?

A. Yes, sir, for the two reasons.

Q. Well, don't give the reasons, but I don't see

(Testimony of Paul W. Tormey.)

anything on the deficiency notice about it. Can you explain that? Perhaps I don't understand.

A. This has to do with——

Q. Do you know whether she claimed specific deductions which are covered by the standard deductions? Is that correct?

A. That is correct. Both places.

Q. And the \$500 standard deduction was therefore disallowed, and she was allowed the specific deductions in so far as she could verify them?

A. That is right.

Q. Now, then, I call your attention to the deductions [243] which were allowed, shown on the adjustment to net income for the year 1944 and ask you to state in general what they comprise?

A. They apply to the taxpayer's subsidiary schedules B and C, having to do with the operation of her business, other expenses, salaries and wages, business taxes, loss, which are allowed as business loss.

Q. Are those items covered here on any of those exhibits that have been introduced in evidence?

A. Yes, sir.

Q. Which ones?

A. All of them are covered.

Q. Not which items, which exhibits?

A. Well, Exhibit K for example. I point to Line 43, \$20.37.

Q. I see Losses.

A. It appears on there, yes. The other items are combined in the adjustment to the business schedule

(Testimony of Paul W. Tormey.)

which I could give you the detail of by referring to my detailed breakdown, if you wish.

Q. Which of the items on the deficiency notice can you identify that are not described in detail on this schedule which has been admitted in evidence here this morning? Let's take the first one, \$289, not introduced on Exhibit F.

A. It doesn't appear. [244]

Q. Is it included in the total computations of Exhibit K? A. Yes, indeed.

Q. What are the items on Exhibit K which reflect that item of \$289 in the deficiency notice?

A. That is an item of \$120. I was wrong here. Item labeled "Schedule B", increase in other expenses, Schedule F, \$289, actually applies to the increase in rent expense which we have, other rent expenses as corrected amount to \$927.83 as claimed on the return as Schedule F, amount to \$638.83 which reflect the increase.

Q. This \$289 is the difference between \$927.83 which you allowed as corrected expense over and above the amount of \$683.

Do you know now what they pertain to? Were they ascertained from her books after a detailed audit of them?

A. Oh, yes. I can give you the details, but I know it applies to rent expense. I was looking through the business schedule.

Mr. Crittenden: \$638.83 was reported.

The Court: That is what was claimed, the amount she claimed.

(Testimony of Paul W. Tormey.)

Mr. Crittenden: And the \$927.83 is the amount allowed, so this is the difference, \$289. [245]

Q. (By Mr. Marcussen): The next item is "Increase, Salaries and Wages, \$771.90."

A. That adjustment corrects a net understatement on the taxpayer's 1944 return of wages paid. I can explain how it is arrived at, if you wish. First, I will have to give you the background. She employed her sister, Rose Mattick, during this year. Mrs. Mattick had a stated wage of \$30.00 per week for a portion of the year and a stated wage of \$50.00 a week for the balance of the period.

However, she made certain expenditures for the taxpayer which are covered in the sworn statement in evidence in the nature of both business expense and personal items, such as stock and other purchases for the taxpayer. At the end of the week or two weeks, when Mrs. Mattick was paid to the amount of her stated wage, an excess amount to cover these additional expenditures that she had made on behalf of the taxpayer was given her.

However, the taxpayer, from the invoices in the case of her business entered the liquor or beer purchases, beer and other supplies that were paid out by Mrs. Mattick in cash as if they had been paid from the business, and, in the sworn statement, she explained that it is a duplication of entries there; so as not to penalize the taxpayer for this excess amount, which amounted, in total amount for the full year, to \$2,316.05. The taxpayer estimated that \$500 of that [246] \$2,300 would be applicable to

(Testimony of Paul W. Tormey.)

her as personal expense of her own, having no connection with the business.

Q. You mean personal expenses in connection with purchases? A. For living expenses.

Q. Which Mrs. Mattick, her sister, made for her?

A. That is right, and the taxpayer—it was her estimate of the amount—so that the other amount was taken out of the totals.

Q. The other amount? Identify that, please.

A. I have testified that there was a total of \$2,316.05 of which \$500, Mrs. O'Connor accepted the responsibility for.

Q. And by "other amount" you mean the balance?

A. The balance amounting to \$1,816.05 was excluded thereafter from our computations of business income, under source and application of funds method, by reason of the fact that the taxpayer testified that all business deductions which were included in that amount had been entered from the invoices and already appeared, and so we got to the proper amount of Mrs. Mattick's salary. The return claims wages, under the schedule, of \$4,051.50. The correct amount of all wages is \$5,823.40, and the increase which we have allowed by the auditor going through these books, is \$1,771.90.

The Court: In other words, that deduction was increased by that amount? [247]

The Witness: Yes, sir.

Q. (By Mr. Marcussen): Was there a corre-

(Testimony of Paul W. Tormey.)

sponding increase in allowable business deductions?

A. No.

Q. Then there is an item for increases in taxes on business. I think that is self-explanatory, over and above the amount she claimed. Can you identify that very easily as to what the difference is?

A. Yes, sir. It is made up of a net increase of \$27.50 on a Federal liquor license which we found had been paid, but not claimed by the taxpayer, less an overclaim of \$1 on her City Health Permits. It was claimed on the return in the amount of \$19.00 and the actual amount is \$18.00, so the additional allowance was \$26.50.

Q. Then there is an item, increase in losses, schedule G, \$100, unreported theft of Rex Price.

A. That appears also on Schedule K on Line 26, Losses in Business. Her return showed corrected amount \$100 additional allowed. We accepted the taxpayer's sworn statement that Rex Price, a bartender, had stolen the money, and it was confirmed that she had reported it to the police in good faith.

Q. There is an item, one-fifth interest paid on apartment house, \$27.50. [248]

A. That is the portion of the taxpayer's interest and taxes included in the one-fifth disallowance of the total business deductions on the apartment house. We now allow her to take a personal deduction for the interest and taxes included.

The Court: In other words, it is an offsetting adjustment to the amount added in above?

The Witness: Yes, sir.

(Testimony of Paul W. Tormey.)

The Court: The same thing is true of the \$63.69 in taxes?

The Witness: That is correct.

Q. (By Mr. Marcussen): Then State Income Tax, \$44.96.

A. The taxpayer failed to claim her state income taxes as a deduction, and we allowed that.

Q. And \$505.00 bad debts. How about that?

A. It is explained by the letter itself. The taxpayer claimed she lost a purse and \$350, and paid Mr. Green for a bond covered in the sworn statement.

Q. (By the Court): And those three items total \$505.00 added deductions?

A. That is right, the \$150 is the credit allowed her that I testified to this morning on those loans, and \$150 is now written off in this year.

Q. Then those total deductions, all of those items [249] total up to \$2,821.42?

A. That is correct.

Q. Which were additional deductions allowed but not claimed? A. That is correct.

Q. (By Mr. Marcussen): Now, Mr. Tormey, for one of those years, was a deduction of some \$500 allowed twice for the liquor license?

A. I will have to explain the answer.

Q. Just answer that question.

A. It was not then.

Q. It was not? Then explain your answer.

A. Yes, sir. The taxpayer's return of the partnership with Victor Divers shows the payment of

(Testimony of Paul W. Tormey.)

1942 liquor license in the amount of \$525. The taxpayer's personal return shows on her business tax for 1942 the payment of license of \$525. The books disclose that this payment was made in December, 1942 and was therefore applicable to the year 1943, so that there is an apparent overstatement of the deductions claimed, but it is between the partnership and her as an individual, rather than on any one return.

Q. Well, the net effect of it is that she has a credit in the computation of her income tax for 1942. She has been credited with a deduction of the \$500-odd amount for liquor license twice, has she not? [250]

A. One and one-half times. She had a half-interest.

Q. Well, the \$500 for the liquor license was included in the deductions claimed on the partnership return for the computation of the Divers-Jost partnership income for the first six months of 1942, was it not? A. Yes.

Q. Then there was allowed to her on her personal account a similar item for the amount, for the year 1943, is that correct? A. '42.

Q. It was allowed in '42, but was it the liquor license for '43? A. That is correct.

Q. It was paid in December, 1943, the last days?

A. December '42.

Q. And how about for the year 1943, did she get a deduction for her business income of a liquor license in that same amount of \$500 for that year?

(Testimony of Paul W. Tormey.)

A. Yes, \$525.

Q. For the year 1944, did she get a similar deduction? A. Yes, sir.

Q. Can you state whether or not the taxpayer is on an accrual or cash basis?

A. She is required to be on an accrual basis.

Q. Because of the necessity of using inventories in the computation of her income? A. Yes.

Q. Can you state whether or not under those circumstances the deductions allowed for liquor license is a proper deduction?

A. It is an improper deduction.

Mr. Marcussen: That is all. [252]

* * * * *

CLARENCE L. KRAUSE

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Marcussen): Will you state your name? A. Clarence L. Krause.

Mr. Marcussen: If your Honor please, before I examine the witness, I want to call to your Honor's attention, I wish to apologize to the Court for allowing these ledger cards and summary sheets that were produced by Respondent, introduced in evidence by Respondent, through the witness Roche, to be marked 11 and 12 respectively.

They should be corrected to indicate that they are the Respondent's Exhibits. They have a number

(Testimony of Clarence L. Krause.)

indicating that [253] they might be the Petitioner's exhibits.

The Court: Is that right? If so, that statement is sufficient for the record. I didn't know, I wasn't aware, that they had been so marked.

So the exhibits formerly marked 11 and 12 and pertaining to the testimony of the Witness Roche will be Q and R, because they are not Petitioner's exhibits.

The Clerk: Shall I mark the previous marking void?

The Court: Yes.

(The documents previously marked Petitioner's Exhibits 11 and 12 were marked Respondent's Exhibits Q and R, and received in evidence.)

Q. (By Mr. Marcussen): What is your occupation?

A. Special Agent, Bureau of Internal Revenue.

Q. Where are you stationed?

A. Sacramento.

Q. I will ask you whether or not this morning you consulted the records of the Superior Court in the action of Jost against Jost. Did you?

A. I did.

Q. Did you see on file there an affidavit signed by Mrs. O'Connor in connection with an attempt on the part of her former husband, to reopen that case?

A. I did. [254]

Q. Did you make a transcript of certain portions of that affidavit?

A. I did.

(Testimony of Clarence L. Krause.)

Q. I hand you your notes from which you made that transcript.

Mr. Crittenden: Suppose I suggest that you get a photostatic copy and put that in the record and save all this time and trouble.

Mr. Marcussen: No time and trouble—getting a photostat would be more time and trouble.

The Court: If Mr. Crittenden agrees that it go in——

Mr. Marcussen: Will you agree that this go in?

Mr. Crittenden: Whatever is in the record, if you want to type it in, after you have prepared it.

Mr. Marcussen: We could let him read his own notes and if that is not satisfactory, then we can get a photostatic copy of her affidavit.

Mr. Crittenden: You are putting me behind the 8 ball. I haven't seen the file. Type it up and tell me if it is a true copy and I will put it in.

The Court: By his statement, if you get it fixed up that way, then you may let him see it and he will agree to it.

Mr. Marcussen: That is all right.

Mr. Crittenden: I will even take your word that you [255] have compared it and it is the same.

The Court: That may come in by agreement of both parties and will be made a part of the record.

Mr. Marcussen: That is all. [256]

* * * * *

Mr. Marcussen: I will recall Mr. Tormey.

Whereupon,

PAUL W. TORMEY

resumed his testimony as follows:

Direct Examination—(Continued)

Q. (By Mr. Marcussen): Mr. Tormey, this morning we were speaking of an item of \$3,936.32 which appears on page 3 of the deficiency notice in this case. Have you prepared a statement reconciliation showing what that is composed of?

A. Yes, I have.

Mr. Marcussen: I will offer that as Respondent's Exhibit next in order.

The Court: Exhibit "S".

The Clerk: "S".

(The document above-referred to was received in evidence and marked Respondent's Exhibit "S".)

Q. (By Mr. Marcussen): Now, can you give a brief description of what that computation shows on Respondent's Exhibit "S"?

A. Yes. I can first mention that taxpayer's 1944 return has a schedule identified as C-17, "Other Expenses", which totals \$19,608.11. This total appears in Schedule C on line 17. We find that from the detail submitted by the [257] taxpayer, that it is made up of purchases, advertising, charities, utilities and so forth. Our audit disclosed adjustments to nearly all of these items. In the first place, the taxpayer's schedule C does not include any inventories, so that when the items identified as liquor, beer and wine, mixers, food and bar supplies are

(Testimony of Paul W. Tormey.)

adjusted and the inventories applied, the cost of goods sold is increased \$3,519.34.

Q. That is ending inventory for the year, is it not?

A. Yes. The items are items which are ordinary business expenses listed by the taxpayer as advertising, state income tax, charities, gas and lights, rent, laundry, insurance, repairs, miscellaneous and general expense. The advertising item we found could be increased by \$434.69. The income tax and charities were disallowed in this Schedule as testified to earlier this morning. The utilities were increased \$22.28. The rent was increased \$23.78; laundry increased 36c. Insurance, repairs and miscellaneous expenses were reduced as indicated in the Exhibit.

Q. \$84.64? A. \$14.03.

Q. That is the insurance?

A. Insurance \$84.64 deduction. Repairs \$14.03 reduction. Miscellaneous and general expenses \$38.23 reduction. The total of those increases and decreases amounts to a net decrease of allowances in this part of the Schedule of [258] \$416.89, so that the total decrease on Schedule C of the taxpayer's return is \$3,936.32 as shown on item on page 3 of the deficiency notice.

Q. Now, in making this audit with respect to the Lachman Bros. account, will you state whether or not you relied on this transcript of that account, Respondent's Exhibit "Q"?

(Testimony of Paul W. Tormey.)

A. No, I did not rely on this transcript. However, since the Exhibit came in——

Q. I don't mean transcript. I mean these ledger cards?

A. No, I did not. I have checked the taxpayer's list of check payments and cash payments in her own records to the credit columns of these cards and find that they agree with the amounts which I have used on my application of funds source and application of funds statement which I testified about this morning. I notice that Lachman Bros. furnished a summary statement, showing the taxpayer's beginning balances, the purchases in each of the years and the payments in each of the years.

Q. That is Exhibit "R" you are referring to now?

A. That is right. While I was again able to check the purchases which appear as debits on this customer's card furnished for the Exhibit to the Application of Funds statement that I have prepared and talked about this morning, I was not able to check their own detail to this statement, so I [259] question that that is exactly correct.

Q. Well, you didn't rely on this in any summary statement furnished by Lachman Bros. accountant?

A. No, I did not, except to find out what the taxpayer's liability in each of the years was. I originally checked with Lachman Bros. directly, not to this statement. I secured the year-end balances from them at an earlier time, which checks with the details on this card.

(Testimony of Paul W. Tormey.)

Q. I see. You did not see this card before, but you got the information from their accountant?

A. Yes, from their bookkeeper.

Q. And that information is contained on these cards? A. That is right.

Mr. Marcussen: That is all.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Crittenden): Mr. Tormey, these papers which you have testified to in this case were made up in the same manner and are the same figures that you used in the two District Court trials?

A. You will have to explain your question, Mr. Crittenden.

Mr. Marcussen: Just answer it yes or no, Mr. Tormey.

Q. (By Mr. Crittenden): I want to know whether it is necessary for me to go [260] in and thoroughly examine you on these Exhibits J, K and L or whether those are the matters you testified to in the District Court?

A. I have made only one audit and the working papers and schedules that I have testified to have been the same, so far as I can recall. You must be aware, however, that items of income for the purposes of the criminal trial will not agree with the amounts as determined for the deficiency notice.

Q. Did you use different papers? I am referring to Exhibits J, K and L that I have in front of me here. If I used some other words to describe it, I

(Testimony of Paul W. Tormey.)

meant these three sheets of paper that I have here?

A. Yes, I understand what you mean.

Q. Now, Mr. Tormey, you were present at that ill-fated incident of April 3rd, were you?

A. I was present at a conference of the Technical Staff on April 3rd.

Q. And had occasion to talk to the taxpayer at that time? A. Yes.

Q. You talked to her about the case?

A. No.

Q. And asked questions about the case?

A. No. I was simply there as an observer of the Special [261] Agents Office. I had no discussion with the taxpayer or her representative about the case, as the case.

Q. You didn't say anything in the course of this conference?

A. No. I furnished information if Mr. Sorrell or Mr. Marcussen would ask me for it.

Q. You didn't use that as an occasion to drive a wedge between me and my client as a result of my interrogation in the District Court involving that "blond babe?"

A. I don't relate your two questions at all. I can answer the first question.

Mr. Marcussen: Do you understand the question?

The Witness: I can answer the first part of the question up to the statement that was made about the District Court.

Q. (By Mr. Crittenden): Answer the question.

(Testimony of Paul W. Tormey.)

A. I have no knowledge of the wedge between you and your client and I had nothing to do with same.

The Court: Now, let me observe here that references like "blond babe" and things of that kind, they don't mean anything to me.

Mr. Crittenden. They are in the testimony and your Honor will see that when you go through it.

The Court: I know that there is no reason for indulging [262] in that sort of expression here. Now, let's be simple and direct. You are not trying a case to a jury.

Mr. Crittenden: No, I am not. I am trying questions of fact.

The Court: All right, let's get along.

Q. (By Mr. Crittenden): Now——

A. I would like to amplify my answer to that question.

Q. Go ahead.

A. I overheard distinctly Mrs. O'Connor stated to all the members of the conference that she desired to discharge Mr. Crittenden.

Mr. Marcussen: Let's dispense with that. Let's answer the question.

The Witness: I answered I had no knowledge of the wedge, but I overheard that statement.

Mr. Marcussen: Just answer the questions, Mr. Tormey.

Q. (By Mr. Crittenden): Now, referring to your Exhibits, you testified there was an opening

(Testimony of Paul W. Tormey.)

inventory of the Tavern for \$1000.00 on Exhibit "J" as of December 31, 1941, isn't that right?

A. I did not so testify.

Q. Well, I take it then that that \$1000.00 on the first column up here——

A. This one here? [263]

Q. Yes.

A. That is the cost that she paid for the first half interest in the Tavern.

Q. What was the reference to that thousand dollar inventory in your direct?

A. Is that a question?

Q. Yes.

A. There was a thousand dollar inventory established at the time she set up her books for the purposes of our audit, deducting from the cost of her second half interest for which she paid \$1,600.50 by taking \$1000.00 on her own testimony as inventory.

Q. And this \$1000.00 appears in the computation of income and expense items on Exhibit K, I believe it is?

Mr. Marcussen: "K" is the income statement.

A. Yes.

Mr. Marcussen: Do you want Exhibit "K"?

The Witness: Which I can point out to Counsel.

The Court: In what column on the Exhibit?

The Witness: Beginning inventory, column 2, year 1942, \$1000.00.

Q. (By Mr. Crittenden): And at that time she only had a one-half interest in the business, didn't she?

(Testimony of Paul W. Tormey.)

A. No, I beg your pardon. We have just explained that [264] she had the whole business, but of the part, she paid for the last half, \$1000.00 of it by her own agreement was considered as merchandise.

Q. Now, you made an analysis of the expenditures, personal expenditures and had it entered down here, I believe, it was 8 or \$900.00, was it?

Mr. Marcussen: Find it for him, if you can.

Q. That is \$935.00 on Exhibit "K".

A. Recorded personal expenses.

Q. Yes.

A. Those appear in her own books.

Q. And you added to that the \$2400.00 which you estimated was her living expense?

A. Yes, that was exactly covered in the testimony of her sworn statements, which are in evidence, very clearly that that is in addition to the recorded personal expense.

Q. I take it then that this is in addition to the recorded expense?

A. That is exactly right.

Q. You don't include them at all, one isn't inclusive of the other? A. No, sir.

Q. Now, I take it you set up—she reported entirely on a cash basis, didn't she, in all these returns?

A. I don't know what basis she reported on. She is [265] supposed to have reported on the accrual basis. The absence of inventory, we have no

(Testimony of Paul W. Tormey.)

way of knowing whether it was a cash basis or accrual basis.

Q. You have seen Mr. Bozerman's work sheets, haven't you?

A. I have seen some of his work sheets.

Q. Yes, that he used in making up the returns; you saw them, didn't you?

A. I don't understand the question. I have answered I have seen some of his work sheets.

Q. And they are on a cash basis entirely?

A. I would be rendering an opinion of his working papers and I am not qualified to do that, Mr. Crittenden.

Q. Now, you didn't intend to make up this account on the hybrid system?

A. I heard you give a definition of the hybrid system and if that is the system you had in mind, I did not.

Q. You made up these accounts originally for the District Court both with and without inventories, didn't you?

A. I didn't make up the accounts on that basis. The certain hypothetical results were tabulated on the basis, including inventories or without inventories. They were done by the technical advisors. I think Mr. Mytinger testified to it.

Mr. Marcussen: What trial are you referring to, the [266] first or the second one?

Mr. Crittenden: Both of them, I believe.

Q. (By Mr. Crittenden): Now, asking you to examine the sheets, will you tell me how many items

(Testimony of Paul W. Tormey.)

which she understated her income on such as rents and other items? You have one here on Baker Street. Is there any other instance in which she understated her income?

Mr. Marcussen: Do you have her statements there?

The Court: Just an accounting?

Mr. Crittenden: No, the items.

The Court: You mean you want him to name them?

Mr. Crittenden: Yes, just name them?

The Witness: Do you want them separately or combined total also? How do you want them?

Q. (By Mr. Crittenden): You have an analysis there and I want you to read them off.

The Court: The various items where they are increased?

Mr. Crittenden: Where she understated her income.

A. I would like to explain any profit and loss statement is made up of a combination of totals of items. The detail within those totals may have items which had to be increased or decreased. Therefore, the totals themselves [267] are sometimes increased or decreased. Now, I would like to be able to qualify my answer, that I am reading the totals of certain segregations——

Mr. Marcussen: Just a moment. Counsel has asked you specifically, if I understand the question to state to him the specific items of understatement of her income, the actual income as compared with

(Testimony of Paul W. Tormey.)

the amount shown on her return. Is that what you want?

Mr. Crittenden: I say overstated like in the Baker Street property.

Mr. Marcussen: Overstated? Do you mean——

Mr. Crittenden: She stated too much on the Baker Street property and I am going to take the overstatement of that and the understatement of the expense. There is no pattern followed in this and that is what I want to bring out in the statement.

The Court: You had better get it straight there. You have wandered around considerably.

Q. (By Mr. Crittenden): Where she overstated income? One of the years was '44.

A. That is a good example of the question I had in mind when I said she overstated. In the year '44, the taxpayer's return reports \$2400.00 and I explained this morning the \$1205.00 of that rent was applicable to the Baker Street [268] property whereas she reported it all as Baker Street property. On the other hand, in the same year she failed to report any income, rental income from the Valencia Street property, so that the effect in that year, take \$519.00 overstatement of income rather than the amount that would have been overstated if you just deal with the Baker Street property.

Q. Now, as to deductions?

A. I haven't answered your question about these items. Do you want to forget that?

Mr. Marcussen: Finish your answer, please, Mr. Tormey, if you have anything further to say.

(Testimony of Paul W. Tormey.)

The Witness: I thought I was to find out wherein are items of overstatement of income.

Mr. Crittenden: Yes.

The Court: Go ahead.

Mr. Marcussen: Are you inquiring as to all years?

Mr. Crittenden: Yes, all years.

The Witness: Well, I believe that is the only one. There are some details within smaller segregations that would have that effect.

The Court: Effect? In other words, that would be the net effect of some of the other adjustments?

The Witness: That is right.

Mr. Marcussen: And your testimony was with respect to rents received in 1944? [269]

The Witness: That is right.

Q. (By Mr. Crittenden): Now, there was at the time when she stated her deductions, items of deductions smaller than she was entitled to according to your account. Will you give me those items?

A. Yes, there were a few of those. There again it would be a pretty long detailed process to give you all the details. I can give you the total wherein that happened, like items of cost of goods sold, we will say, if that applied. For example, in 1942 the net cost of goods sold by the taxpayer's return was \$9,026.89. The corrected cost of goods sold was \$7,518.78, so that there is an apparent overstatement, I mean an understatement of deduction by the taxpayer. That would be an overstatement of deduction by the taxpayer of \$1508.11, but it is

(Testimony of Paul W. Tormey.)

brought about by the fact that we considered the inventory figure reduced her cost of goods sold by applying the ending inventory and her return doesn't take the inventory into account. Is that the type of answer you want?

Q. Yes, that is the kind I want.

A. All right. In 1943 the net cost of goods sold was increased by our audit \$3,042.66, so that could be considered the taxpayer didn't take advantage of deductions. However, it is entirely explained by the absence of inventories again. I might say that the total for the two and a half [270] year period as respects that net cost of goods sold is that the audit with the inclusion of inventories reveals additional income by reason of disallowance of deductions in the amount of \$1,984.79.

Q. That is by reason of increased inventory?

A. Yes. She had no inventory at the beginning, according to her, and ended up with an inventory of \$5,808.04.

The Court: \$5,808.00?

The Witness: And 4c, yes, sir.

Mr. Marcussen: That figure, then, if I may interject here, Mr. Tormey—may I, at this moment?

Mr. Crittenden: You may if you wish.

Mr. Marcussen: That represents the overstatement of cost of goods sold during the two and a half year period, does it not?

The Court: Reflected by closing inventory at the end of that period, as I understood it.

The Witness: No, Mr. Marcussen. Our audit has

(Testimony of Paul W. Tormey.)

reduced the total cost of goods sold by \$1,984.79 by virtue of the fact that we have set up the inventory.

Mr. Marcussen: Very well. I think that is correct.

The Court: And that amount was the inventory at the end of the two and a half years?

The Witness: That is right. Now, you wish me to continue? [271]

Mr. Crittenden: Yes.

The Witness: For the year 1944, we allowed additional salaries and wages in the amount of \$1,771.90 about which I testified this morning. The details came principally from the Matticks and wages paid them and looking down the total column here and to avoid repetitions here, the increased allowances for taxes on business were \$763.69 for the whole period. \$100.00 on losses, \$56.00 on bad debts, \$39.00 on depreciation offset by a reduction of rent, repairs and other expenses of \$436.17.

The Court: \$436.17?

The Witness: Yes, sir. That is about all the detail I have, Mr. Crittenden.

Q. (By Mr. Crittenden): Now, I take it from those sheets of J, K and L, that the income you arrive at by increase of net worth and by the accounting method of receipts and disbursements are almost identical, aren't they?

A. I have reconciled them to be actually identical. The Application of Funds method reveals cer-

(Testimony of Paul W. Tormey.)

tain uncounted cash and the net worth assets which increased by these expenditures which were agreed to by the taxpayer exactly reconcile.

Q. Isn't that unusual to have them come that close?

A. Well, you may be thinking—well, I won't tell you. [272]

Mr. Marcussen: Just answer the question, Mr. Tormey.

Q. (By Mr. Marcussen): You don't consider that unusual at all?

A. If a Application of Funds statement, Mr. Crittenden, is made correctly, it would have to reconcile with the net statement or it is not a very good accounting. If the information is made available to you, it's just like a profit and loss statement connected with the firm that keeps double entry books or the surplus, as in the corporation. They have to tie in some place with the change of assets. Otherwise, it wouldn't be a true statement.

Q. You had an opportunity to make investigation in your audit?

The Court: What do you mean by that?

Q. (By Mr. Crittenden): Did you go out and inquire of various people what financial transactions they had?

A. Oh, of course, I investigated the taxpayer at the time of one of our statement. It took place on the Exhibit here.

Q. Those are the only ones appearing in that Exhibit?

(Testimony of Paul W. Tormey.)

Mr. Marcussen: Which one? May I have it identified?

Mr. Crittenden: I don't know. He has mentioned one. Which Exhibit is that?

The Witness: Statement of February 8, 1946, I know [273] refers to the fact in connection with the inventories, I told the taxpayer we had confirmed her purchases with these different suppliers so she could rely on the prices.

Q. (By Mr. Crittenden): Other than the evidence we have here that are the basic data of books, records, checks, statements of the discrepancies, that includes all of the matter that you have used in setting up this account, is that right?

A. So far as I can recall. I wouldn't like to limit myself by such a statement. I remember checking with Lachman's. I remember checking with several of the Diamond people. I remember checking the County records and the escrow agreements on the changes of property. I might overlook some item that you have in mind. I made the usual checks on items.

Q. We have all the basic data used in all of your computations used in the evidence here?

A. So far as I know you have. That was our intention to put it in.

Q. And that includes not the final computations, I mean the basic data and by that I mean the books, records, the vouchers, checks or the bank statements or such matters?

A. That is correct.

(Testimony of Paul W. Tormey.)

Q. Now, Mr. Tormey, you used the Application of Funds method in your accounting here? [274]

A. For the purpose of the civil liability that was always used. They haven't been changed. These schedules were dated the original date and haven't been changed a bit since.

Q. And your schedules were made on the base that so much money went through my client's hands in the certain accounting?

A. You can put it on that basis.

Q. I am trying to find out the method of accounting you used here so I can go ahead and ask some more questions. You used the Application of Funds method and the Source of Funds method in your accounting here?

A. I used the Application of Funds method and the Source of Funds method, yes.

Q. And that was the one used exclusively?

A. Our audit wasn't restricted to any exclusive method. We did this to determine the unreported business receipts; that was exclusively used for that purpose, I will answer it that way.

Q. Based on the fact——

A. It was not used for the purpose of the income deficiency system alleged in the criminal trials, if that is what you are aiming at.

Q. Do I understand that the way you set this up was a method of determining all the receipts and expenditures and that if she spent so much money, she must have received that much to have spent it? [275]

(Testimony of Paul W. Tormey.)

A. No. I proceeded to find out what the unreported income was by analyzing the known receipts and the known disbursements and the discrepancies between the two had to be income.

Q. Had to be from some source?

A. Well, she——

Q. Now, you made up a statement then of all the moneys that went through her hands?

A. They are in evidence, yes, sir.

Q. Now, you made up a statement, we will say, of the expenses that went through her hands in February of 1943. Would you bring out your work sheets and show what is that?

Mr. Marcussen: You are referring to an Exhibit?

Mr. Crittenden: I must have the data to arrive at the figuring during a certain accounting period. Did you set up work sheets on those?

The Witness: Why of course.

Q. (By Mr. Crittenden): Will you show me how you did it?

A. It's pretty voluminous, involves bank statements, Hyman's statements, everything.

Q. By the way, this was your first case you worked on with the Department, wasn't it?

A. It happens to be not "by the way"; however, it was.

Q. And the first spread was made by Mr. Krause, the [276] spread of checks?

A. Mr. Crittenden, I don't know whether I am required to answer this. I think Mr. Krause will

(Testimony of Paul W. Tormey.)

back me up on it that the original and the only spreads made in this case are right here and he or I can identify who made them and they have not been changed or even taken out of this folder since they were put there. What is your question now, please?

The Court: He wants February 1943.

Q. (By Mr. Crittenden): February, 1943?

A. Just what do you want in February? Do you want checks or cash disbursed?

Q. Now, let's start on disbursements entered in the book here as cash?

A. Are you going to take detailed items?

Q. We will take detailed items?

A. I want to explain that they are original spreads of checks and cash disbursements. Then there is a recapitulation of those cash disbursements for the same months and then there is a summary of redistribution, giving effect to the taxpayer's reallocation of these things; so, we may have to hunt through three sets of folders to get the details.

The Court: He may have to ask you specific questions and then you see what you can do with them. [277]

Q. (By Mr. Crittenden): Now, there is \$3.00 for Dr. Schottke. I want to find out how you handled that? We are going to get all the items that appear in this book.

Mr. Marcussen: Now, may I inquire of Counsel whether you propose to take every item entered

(Testimony of Paul W. Tormey.)

in that black book and interrogate the witness about it?

Mr. Crittenden: No, I am going to show that the totals he carries across do not bear a relationship to these items.

Mr. Marcussen: Now, if your Honor please, it has been established that this is about the most incomplete record that anyone could possibly keep. It was necessary and I think the evidence will show that it was necessary for this witness and other members of the Intelligence Unit of the Bureau of Internal Revenue to spend approximately from three to six months to conduct an audit of the taxpayer's books and returns, and Counsel is now proposing to go through every detailed item in the book to ascertain how it is handled there. Now, that might be competent cross examination, but he states his purpose is to show that the audit papers will not total the totals in the book and I will stipulate, your Honor, they will not so show. The books are completely inadequate and the evidence here is to the effect that this audit is based upon those books, upon independent investigation made on the outside to corroborate the deductions that she [278] claimed and also to corroborate income for the purpose of using it to interrogate her about her income and then based upon the statements that she made, which are in evidence in this case. He has completed that audit. Now, if Counsel proposes to pursue this line of questioning for the sake of showing a discrepancy between those books and this

(Testimony of Paul W. Tormey.)

audit, it proves nothing in this case and I will submit we will be here two months doing it.

Mr. Crittenden: I just hit a tender spot.

The Court: Now, just a minute. Let's get along in this case. Ask your questions and he will answer where he can and I will decide these points that you are concerned about. I have the record here and I have listened to how this is made up and furthermore I have had some experience with this sort of a case and this sort of a trial and I will do my own judging. All right, now, get down to the specific questions and we will get them in the record and if they amount to anything, why, we will determine then about how far we will go in that sort of stuff. If they do not, then we will leave it to argument on your briefs.

Q. (By Mr. Crittenden): Now, cleaning rug, \$4.55?

A. I want the record to show that Mr. Crittenden, after tell me to look for an item in February 1943, was pointing to an item in February, 1944, and I couldn't see it and I [279] think you did it on purpose.

The Court: Now, just keep your peace and let's go ahead with these questions and I don't want any bickering here.

Q. (By Mr. Crittenden): I am pointing to cleaning rugs \$4.55?

Mr. Marcussen: Let the record show that Counsel is pointing to the entry in the second column on the right hand page entitled February 1943.

(Testimony of Paul W. Tormey.)

A. You will note, Mr. Crittenden, that if you total column 10, it will come to \$13.98.

The Court: You will have to speak up. Everybody around here has to hear.

Mr. Marcussen: Just a moment. What is column 10?

The Witness: That is the column in which that figure appears.

Mr. Marcussen: Just explain what column 10 is in relation to the physical condition of that book? Where is column 10 in that book?

The Witness: It's the 10th column over from the extreme right-hand side.

Mr. Marcussen: For February 1943?

The Witness: Yes.

Q. (By Mr. Crittenden: The total is \$13.98. May I read into the record what is in it? [280]

The Court: Let Mr. Crittenden finish what he is going to do now.

Mr. Marcussen: If your Honor please, he has asked me to check it with him. I would like to have him check it with the witness.

Mr. Crittenden: I am going to read the column into the record.

The Court: You go ahead and do the reading and I will have the book and I will do the checking. Do your own reading and if you read wrong, that is your business.

Mr. Crittenden: Miscel., starts out with "music, .15; cleaning rug, 4.55; medicine and hair-do, 5.85; Dr. Spankey for bill, 6.00; phone and telephone to

(Testimony of Paul W. Tormey.)

May, 1.80; money order, Mom, 2.00; flowers Opal birthday, 3.00; flowers music, .55; flowers music, .55; policeman, 1.00; hair washed, set, 2.00; Dad's birthday, 5.00; gasoline, drugs, 10.00; salt-pepper shakers, .50; poppy card, .50; rug, 5.00; music, .60; Stell and hats for party, 1.85; drinks at Cozy's for anniversary, 7.50; music, .60; and the column Counsel says adds up to \$13.98.

The Witness: You didn't allow me to finish my answer. Do you wish to hear it?

Q. (By Mr. Crittenden): You may finish it.

A. Will you look at the work papers you were so anxious [281] to see.

The Court: Now, dispense with any of this side comment and get down to the substance.

Mr. Marcussen: Now, he has called to your attention this \$13.98. Do you have any answer to that?

The Court: He will make it. You don't help things along by that.

Mr. Marcussen: I will withdraw that.

The Court: You will have your chance to ask questions. Let this examination go on.

The Witness: I say the column was totaled at \$13.98 and that figure appears in the taxpayer's books. I repeat this is in this schedule. Come here. "As spread in the book."

The Court: That is in his work-sheet?

The Witness: "As spread in the book," column 10, a photostat. Actually, it is \$58.95 plus the \$6.50 garbage and those correct totals are accounted for on the righthand side of my sheet, including the

(Testimony of Paul W. Tormey.)

\$13.98, which is all charged to "general expense." \$40.00 was charged to Mrs. O'Connor personally which the nature of the items just read will certainly support.

Mr. Crittenden: Will you stipulate, Counsel, that he searched that and there is nothing for \$6.30 for garbage?

Mr. Marcussen: I followed you. Now, what do you ask me to do? [282]

Mr. Crittenden: Go down the column and see if there is an item for \$6.30 or items for garbage.

Mr. Marcussen: There is an item of \$6.50, at the bottom \$13.98. There is a pencil notation in the column.

Mr. Crittenden: I am talking about the books themselves.

The Court: Well, I suppose that is on the book?

The Witness: It shows in my photostat, garbage, \$6.50. It wasn't in any column.

Mr. Marcussen: Where are you?

The Witness: Right down there. I included it in here.

Mr. Marcussen: Where is garbage?

The Witness: Right here.

Mr. Marcussen: That is the \$6.50 I am talking about and extended over in the third column is garbage with no other amount in the column.

Mr. Crittenden: Now, let's take March.

Mr. Marcussen: 1943, I take it?

Mr. Crittenden: That is right. Where it starts: "Bosserman for filing income tax papers, \$45.00"?

(Testimony of Paul W. Tormey.)

The Witness: I have allowed it as \$45.00 accounting service.

Q. (By Mr. Crittenden): That is shown on which page? [283]

A. I don't have these pages numbered. These are my personal working sheets.

Q. It is dated at the top of it "January, February, and March of '42?"

A. '43.

Q. '43, excuse me. Now, the next one is "paper for door, \$1.36?" A. For who?

Q. "Paper for door, \$1.36"?

A. It's probably one of those bunches of cash items again. This is March now.

The Court: March, 1943?

Mr. Crittenden: Yes.

The Witness: Well, it is very evidently in the total of some of these cash disbursements that are grouped one entry in here, probably as miscellaneous expense. I do not see the \$1.36 as a separate item.

The Court: You don't have the segregation on your work sheet?

The Witness: That is right. For that particular month, there is a grouping for a lot of stockings.

Q. (By Mr. Crittenden): Now, there is "Brooks, stockings, \$13.85"?

A. I can answer that without looking. It would be charged to the taxpayer's personal expense. [284]

Q. Let's see it?

A. We have a total for the month of \$331.76,

(Testimony of Paul W. Tormey.)

cash disbursements. It's undoubtedly included in that. I do not see it.

Q. Will you tell me what items go into \$331.76?

A. I think I can by taking up the clear spread of that page and adding up the items that were personal. It could be proved out to be that.

Q. Will you show one how you got \$331.76? You start the column with a number of \$331.76. I want to know how you picked that particular figure out of the air?

The Court: I think we will dispense with the adjectives there. Now, you ask him his question.

Q. (By Mr. Crittenden): Will you give me the amount of the \$331.76, what items went into it?

A. Well, if somebody wants to add them up as I list them down here, we undoubtedly can do it.

Mr. Marcussen: Just a moment. How long would it take you to do this, Mr. Tormey?

The Witness: Well, there are about 80 items that are probably personal items, maybe not all of them. Let's see if we can get a few big ones; that will help. Groceries, \$5.68. [285]

Q. (By Mr. Crittenden): Repeat that amount?

A. Pardon?

Q. How much was that?

A. \$5.68. Let's not put groceries in for a minute. They may have been allowed as business expense. Kay's insurance, \$8.00" would be one item. "Bill, \$5.00. Bill, \$5.00. Bill, \$10.00."

Mr. Marcussen: B-i-l-l?

The Witness: Yes, that is her husband. "Music,

(Testimony of Paul W. Tormey.)

25c; Bud, etc., \$15.00; Bill, \$5.00; Bill, \$5.00; Bill, \$5.00; Bill, \$10.00; Bill, \$5.00; telegram to Mam, 85c; bridge fare, \$1.00; Bill, \$8.00; Bill, \$5.00; flowers, and eats, \$1.50; Bill, \$10.00". I am going to add that "paper for door." I think that is in her personal column, too, why I couldn't find it. "\$1.36; books and stockings, \$13.85; music .60." Strike those music items out. I think we allowed her music and flowers as part of the entertainment expense of the thing. But, we will go on. "Gasoline, \$1.64; Marie's baby, \$5.00; Mam's suit, \$29.95; Painting apartment—put a question mark after this one—\$37.00. Otto's birthday, \$2.00; hairdo, \$2.00; balance for painting—with a question mark—\$8.99; some sort of drugs, \$11.55; and Bill's suit, \$150.00. I think we are pretty close to it right now.

Mr. Marcussen: What was the last item, please?

The Witness: Bill's suit. Add those up and see [286] what we get.

Mr. Marcussen: That is approximately \$200 some odd dollars, \$210, somewhere around that figure.

Mr. Krause: According to my hurried computation, \$361.95.

Mr. Marcussen: \$361.95?

Mr. Krause: Not adding the personal column, it's \$361.95.

Mr. Marcussen: May I inquire what is the total items we are attempting to establish here again from your work papers, Mr. Tormey?

The Witness: \$331.76.

Mr. Crittenden: I get \$360.95. That is excluding

(Testimony of Paul W. Tormey.)

the groceries at \$5.68 and excluding that item he asked us to exclude and it's including the ones with question marks of \$37.00 and \$8.00.

The Court: All right, let's get along.

Q. (By Mr. Crittenden): All right, let's take the next one. Let's take, for instance, the items under the column here, like "flowers to ladies, \$2.51." I am going on to April, 1943.

Mr. Marcussen: Second column in the righthand page.

A. I will qualify my answer to this extent, that the column that you pointed to is column 11, or column 10, rather, and both column 10 and column 9 are added personal columns [287] and there appears at the bottom of the column in a group total \$1191.31 that somebody may have to total. Evidently extending over to items in column 9 also. Now, I point to my work sheet that the total personal charges given to Mrs. O'Connor during the month of April were \$1,096.73, which is also the indicated total of those three columns and I, therefore, state that the items of the "flowers for ladies" up there was very probably allowed as business deduction.

The Court: In other words, that would reduce the amount that you added the income as having been personal expenses?

The Witness: That is right.

Q. (By Mr. Crittenden): Now, let's take the next page of May? Suppose we take the first items up here something about flowers, \$2.06?

The Court: Where is that in the book?

(Testimony of Paul W. Tormey.)

Mr. Crittenden: On May 1943, the very top of column No. 10?

The Witness: The same situation applies exactly to that as to my last answer.

Q. (By Mr. Crittenden): You show me what your entry for that is?

A. Yes, sir. We have personal columns totaled at \$262.37 and in the book they appear as \$334.43. We can go and add each item, but it is substantially less. [288]

Q. Do you know which ones have been taken out of here?

A. I can't at this date screen them to make a statement.

Mr. Marcussen: Is this pencil total that you refer to shown in the amount of \$334.00 in your hand writing?

The Witness: No.

Q. (By Mr. Crittenden): Is that Bosserman's?

A. No. I don't know.

Q. You will see the evidence in the record that that is Bosserman's. Now, let's take another item here. Under column here, towels and napkins, being column 1, 2, 3, (counting column 8 on June, 1943, will you give me where that towels and napkins of \$3.50 is?

A. The date is what? Here we are. I have mentioned in two personal columns as spread on the books as \$351.96. Now, we can total these three columns and see if they—

Q. Bosserman puts \$776.28.

(Testimony of Paul W. Tormey.)

The Court: Now, don't say "Bossman" unless you know. Are you referring to those pencil figures?

Mr. Crittenden: Pencil figures of the 7 something.

The Witness: I have spread \$333.00 of that expense to Mrs. O'Connor as personal drawings items and \$18.25 being an error in the book deducted from this column. Let's see what we find, if you want to know about that?

Mr. Marcussen: Don't volunteer any statements. If [289] Counsel is interested, answer the question, please.

Q. (By Mr. Crittenden): Yes. So that your Honor will see what we are doing——

The Court: I know what you are doing.

A. Well, I haven't any other information on it. I was reading that explanation to you so that we deducted it from the personal allowance for business expense somewhere under here. It may be a mislabeling of the items.

Q. (By Mr. Crittenden): Could you tell me what makes up this item \$333.71?

A. Yes. That is the correct totaling of these three columns and I think we can establish that without—beyond peradventure of a doubt, if you just add them up, because that appears in my corrected audited column in the personal.

Q. I don't want to take the Court's time, but I will go on to the next item here. Let's take another one in here. Now, on July of 1943—I am pointing

(Testimony of Paul W. Tormey.)

to an item "flowers for party, \$7.69." I want you to find that one too.

A. I can probably go through the same procedure and find it.

The Court: All right, let's go through the same procedure.

The Witness: Yes, sir.

The Court: That is for what date?

Mr. Crittenden: Column 10 on July of 1943, the [290] item of \$7.69?

The Witness: We have personal columns totaled for \$351.96 and there is no cross reference to the personal column being corrected in that month of \$351.96. Oh, yes, here it is, the same error. I was talking to you about July.

Q. (By Mr. Crittenden): This is July?

A. Yes. \$351.00, it's the same answer I gave you.

Mr. Marcussen: What do you mean by "same error?"

The Witness: Well, the total per book, \$351.96, as per book, and it was \$333.71 per my audit. We allowed the \$16.25 as an error. It says "deducted from personal."

The Court: In other words, that is carrying that much less into her income?

The Witness: That is right.

Q. (By Mr. Crittenden): Now, I notice written there \$464.25 in personal. Where does that appear in the lefthand column over here?

A. We have nothing to do with those totals. Ap-

(Testimony of Paul W. Tormey.)

parently put in by Mr. Bosserman. I think he told me personally he did put them in.

Q. What are the other items that make this \$351.96?

Mr. Marcussen: Will you identify that figure, please?

Mr. Crittenden: I am pointing here to the sheet——

The Court: That is the worksheet of which——

Mr. Crittenden: The work sheet he has in front of me, that is in front of him, July, and it's down opposite, next to the bottom items before the total column or the total line and it's the lefthand column.

The Court: Well, that is unnecessary because that is not in evidence.

Mr. Crittenden: I will put it in evidence so we can work through our briefs and point out to your Honor the errors that appear in here.

The Court: All right.

Mr. Crittenden: I was trying to point it out to your Honor where it appeared.

Mr. Marcussen: Have you posed a question?

The Witness: He asked me where I got this total.

Q. (By Mr. Crittenden): Yes, I asked you where you got that total?

A. The amount assigned by the audit to the personal columns as they appear in the book.

Q. Your audit?

A. No, the schedules' audit. It happens to be Mr. Krause's preliminary work. It's Mr. Krause's handwriting. He is right here.

(Testimony of Paul W. Tormey.)

The Court: It is that part of the accountant's own books that you are carrying into personal expenses, is that it? [292]

The Witness: Yes, sir.

Mr. Crittenden: There is an item, "gave Edna for cleaning, \$5.00" on the same—that is No. 11 column, is it, on August '43?

Mr. Marcussen: That would be column 10. We think we have established there are 8 columns to a page here it appears.

Q. (By Mr. Crittenden): Column 10. "Gave Edna for cleaning?"

A. It will be the same answer, but I will look and see if there was. These personal columns in which that item appears were totaled for \$272.75 and charged to the taxpayer. Now, I will check and see if there was any adjustment to that. That is in August. Those columns plus this and this \$50.00 that he pointed out to me as being identified by "Red Cross."

Q. Which is in column 1, 2,—6, on February of 1943?

The Court: August.

Mr. Crittenden: August, excuse me.

A. The total of the personal columns recorded in the books as \$332.75 of which we spread \$147.75 to Mrs. O'Connor as personal item; \$50.00 was held in abeyance pending the statement that is the Red Cross items which was subsequently disallowed. \$33.40 was found to cover a ring and \$91.60 is an

(Testimony of Paul W. Tormey.)

error to be deducted and I will go to the adjustments.

The Court: What do you mean by "Adjustments"?

The Witness: I will bring that up. It's on another [293] work sheet. We had a conference with the taxpayer.

The Court: You mean that is the amount by which you are reducing her personal total there?

The Witness: Yes, sir.

Mr. Marcussen: When you say "error", are you referring to a mathematical error?

The Witness: It may be an error in distribution per books and that is why I want to check the figure.

The Court: All right.

The Witness: We have another summary. Did you get that 1943 statement from the evidence?

Mr. Marcussen: Yes. Let the record show that the witness has requested Government's Exhibit 4, which constitutes a part of Exhibit 5 in this proceeding and also Respondent's Exhibit G.

The Witness: No, there is nothing on there that applies to the entries we have under discussion. So, I can only assume that the particular \$5.00 that you pointed out in question, "gave Edna for cleaning," was charged to the taxpayer as part of her personal expense and included in that charge which I have mentioned of \$147.75 for the entire month.

Q. (By Mr. Crittenden): You can't break down

(Testimony of Paul W. Tormey.)

for the month what items you charged her personal expenses, can you?

A. Well, there is a total in this month of \$328.75.

Mr. Marcussen: On your working papers?

Q. (By Mr. Crittenden): Or which consist of the following items: \$22.50, \$102.00, \$35.04——

A. \$2.00, \$5.00—there is your item, “gave Edna for cleaning.”

The Court: And that is where?

The Witness: In her personal column.

The Court: In other words, that has been included as addition to her income as amounts expended by her personally?

The Witness: That is right.

Q. (By Mr. Crittenden): Then what are these, the one and \$47.75, the amounts in your worksheets? It says “personal column.”

A. It's from the assembly of these cash disbursements of the first section of the month. I will get to it here in a minute. We had \$272.75 here and we have a “loan to Rose.” That is——

Q. You say you have 272.75?

The Court. Now, what are those, dollars? How is the reporter going to know what you are talking about?

Mr. Crittenden: \$272.75 which shows “personal column”?

A. It's in this personal column some place. [295]

Q. (By Mr. Crittenden): They are in the personal column some place?

(Testimony of Paul W. Tormey.)

A. That is right. I have answered your specific question as to the \$5.00. Do you have another?

Q. The only way I can do is add all these together as referring to August, 1943.

Mr. Marcussen: Now, let's see what you are referring to adding all these together?

Mr. Crittenden: That will be the columns marked "personal column" which consist of four columns, is that right?

The Witness: That is generally correct, but even she was inconsistent in that. She might have personal items over here.

The Court: That is in columns beyond?

The Witness: Yes, sir. If you go through the books, you will find numerous examples of it.

The Court: I think that was demonstrated yesterday in her examination.

Mr. Crittenden: Yes, sir.

The Court: You can't necessarily stand by a particular column. You have to scramble through those whole columns. * * * * *

Q. (By Mr. Crittenden): Now, let's take another one, which is March, 1944, [296] under "novelties for party of Kindle & Graham." Is that the way you pronounce that, "Kindle and Graham," on the first column on the righthand page? Do you see what I am pointing to here, this \$20.00 item?

Mr. Marcussen: In column 10 for March, 1944?

A. May I see the book again?

Q. (By Mr. Crittenden): Go ahead and take the book.

(Testimony of Paul W. Tormey.)

A. I am going to answer this with a very slight qualification that I believe it is allowed as advertising expense by reason of the novelties.

Q. Let's see where the advertising expense is for that month or that accounting period?

A. Now, I don't believe I can answer you, Mr. Crittenden.

Q. May I ask you this: Is there a personal item for that accounting period in which that would be included?

A. Oh, yes, it could have been and might very properly belong there.

Q. Will you tell me what that item is?

A. We charged \$136.14 for the month. "Items of cash disbursement", that would be it.

The Court: That would be in personal?

The Witness: Yes, sir.

The Court: That is the total you have charged as being personal? [297]

The Witness: During that month, yes.

The Court: All right.

Q. (By Mr. Crittenden): Could you tell me what other items would be in that personal items so we can see if we have that \$20.00 in there?

A. We would have to add them up again.

Q. All for March?

A. That is right.

The Court: All right, if we have got to add them up, read them off and let's add them.

Q. (By Mr. Crittenden): You read them off?

A. Now, tickets for something or other, \$9.00.

(Testimony of Paul W. Tormey.)

More "tickets, \$13.00; flowers, \$4.50." Again that might have been allowed. "Dinner at the Clift House, Mam and Rose, \$9.45." "Dr. Spankey"—no, that was paid by check. "Stove repairs, \$23.87."

Q. \$23.87, not a \$13.00 item, is that right?

The Court: \$23.87.

A. "Treat to Tomales, \$4.00; cough medicine, \$1.18; those novelties, \$20.00." Here is an unidentified item of \$50.00 it has no name on it at all. "Piggy bank, \$1.00." I think that is about it. There are some other items I can give you, if you are short here. The figure was \$136.14. That was entered for those cash disbursements. [298]

Mr. Marcussen: Where, on your working papers?

The Witness: Yes. How much did those items total?

Mr. Crittenden: \$135.00 is the sum I got. \$135.00 even.

The Witness: That is it, as near as I can come to it.

Q. (By Mr. Crittenden): That included then the novelties for the party?

A. Evidently, they were, yes, sir. I might explain—yes, sir. I assume it would be novelties for party.

Q. You didn't give credit on entertaining?

A. No. It appears in her personal column in the book and novelties would be for personal party, as far as we can tell. At least, that is my best recollection as to what happened.

Q. Now, may I have that gray book. Now, you

(Testimony of Paul W. Tormey.)

handled these items of expenses on the righthand side in July and August?

The Court: '42?

Q. Of 1942 in the gray book. How did you handle it?

A. It will just be a recollection, if that will do as an answer.

Q. No, I want to see your records?

A. We don't have those in the record because all of the entries subsequent to July 15 were transcribed supposedly into [299] the black book and the disbursements were taken from that book.

Q. You didn't use this gray book after July 16th for any of the purposes of this account then?

A. I didn't use the gray book for anything.

Q. Did you check to see how Mr. Bosserman handled the accounting of the partnership in the first half of the return?

A. No. The partnership return was not under investigation.

Q. You certainly could make the same mistakes in that as he could make in the other accounting?

Mr. Marcussen: I object to that as calling for a conclusion.

Mr. Crittenden: You assumed it was true and correct in your opinion?

Mr. Marcussen: He has testified there was no challenge to it as it was set forth in the partnership return, is that correct, Mr. Tormey?

The Witness: That is right.

Q. (By Mr. Crittenden): It was not audited?

(Testimony of Paul W. Tormey.)

A. That is correct.

Q. How much of that income of the partnership did you attribute as being in physical assets of that partnership?

A. That is rather a compound question. I know what you mean and I think I can answer it. For the purpose of Application [300] of Funds, Mrs. O'Connor was credited with the full amount of that income whether or not it was actually used for those purposes.

Q. Then is it not in the net worth?

A. Application of Funds statement, in this.

Q. You applied all of that to her income, as I take it, then? Is that what I understand you to mean or do I understand you applied this to assuming that she could have reinvested that?

A. I assume it was available for reinvestment there. It appears \$2116.05 on line 36 of Exhibit "J".

Mr. Marcussen: Is that all the partnership or her share?

The Witness: Her share.

The Court: Now, let me get the answer. You treated that as money from that source and you made no——

The Witness: As respect to it, we assumed the whole thing was available to her for the other items known to be acquired, the other expenses known to be acquired during the entire year.

Mr. Marcussen: In other words, it appears as a source of money for the purpose of that statement of the sources and application of funds?

(Testimony of Paul W. Tormey.)

The Witness: That is right. That is correct.

Q. (By Mr. Crittenden: Now, let's go back to November '42. I am doing this at random so as to show what we have done and the question is applicable in '42. This item here, "globes, \$1.65." I want to see how you handle it, in which column you put it, personal or business?

A. That is November? It's in the miscellaneous column.

Q. Under the miscellaneous column?

A. There is a total identified of \$127.05.

Q. That miscellaneous column 10 in this case?

A. Correct.

The Court: You will have to speak out.

Q. (By Mr. Crittenden): This is 10? That is \$127.05 written in pencil?

A. Right, on my work sheet I have shown that total, "Miscellaneous, \$127.05," a check therein included for \$3.49 for phone. That may have come from her check stubs.

Q. May I have that item again, the amount, \$3.00? A. And 49c.

Q. I can't find an item of \$3.49. Can you find it there? A. It may be in the checks.

Q. Oh, there is an item for phone, \$4.50?

A. It may not be even in that book, but in any event, the balance, \$123.56 has been distributed as follows: Personal drawings of \$106.60 and advertising and general expense of \$15.30, so that the item marked "globes of \$1.65." [302]

(Testimony of Paul W. Tormey.)

Q. Excuse me, globes of \$1.65 is divided which way?

A. I can't recall whether it's in that \$15.35 or in personal of \$106.60. I wouldn't have any way of knowing.

Mr. Marcussen: What is the \$15.00 some odd expense that you refer to, what item is that?

The Witness: Advertising and general expense, deductible items that we allow. The fact that there are that number of deductible items out of that one little total would lead me to suspect the globes were allowed.

Q. (By Mr. Crittenden): You would have to take the full page analysis?

A. No, sir. In this case you would have to take that one column.

Mr. Marcussen: Identify the column for the record.

Mr. Crittenden: Column marked "missel" on the right in November, '42, totaling in pencil under it \$127.05 which appears to be in the taxpayer's handwriting. Now, I think this examination has probably brought out as much as if I kept at it a couple of days, so I will go ahead and pick up another point.

The Court: I think that would demonstrate you are about half way through?

Q. (By Mr. Crittenden): All right. How much do you depreciate the lease that my client had on those premises on Valencia Street that [303] terminated in 1945?

(Testimony of Paul W. Tormey.)

A. As respects the lease, we did not depreciate at all. The fixtures and furniture were set up a valuation of \$780.80 per the taxpayer's 1943 return. We, therefore—and depreciation was claimed on the 10% basis or \$78.00 for the entire year. Therefore, for the six months of 1942 on the same basis, we allowed \$39.00.

Q. You carried no depreciation on the lease and the only depreciation you carried is that which is shown on the taxpayer's deed, is that right?

A. Yes.

Q. Or is there any other depreciation?

A. Not as respects the Valencia Street property.

Q. Now, how did you carry the depreciation on the furniture?

A. I have just explained.

Q. That in the bar that was used by the sister in entertainment?

A. I have no knowledge of such furniture.

Q. You didn't carry any depreciation at all?

A. No. I know about furniture, depreciation of the furniture that went upstairs. It's not subject to depreciation.

Mr. Marcussen: Which apartment are you speaking about? [304]

The Witness: Well, any of the apartments. That Valencia Street particularly, I think he is talking about '42 and '43.

Q. (By Mr. Crittenden): Now, how was the husband's salary handled before the marriage? Part

(Testimony of Paul W. Tormey.)

of it was not carried in this account, but charged in the assessment level, is that right?

A. You have mis-stated the situation by the choice of words, but I think I can answer it.

The Court: Go ahead.

A. Mr. Jost reported on the joint return for the year 1942, \$1380.00 as his salary, of which we determined that \$965.00 was earned during the period of his marriage. The difference thereof would be earned prior to his marriage and we don't know how he spent that money. So, as far as the Application of Funds statement, that was made reflecting the acquisition of assets and giving credit to Mrs. O'Connor for the use of any money that we knew about. We assumed that Mr. Jost very kindly turned over his entire salary to her that he could have earned and during that period \$965.00, and, therefore, the unexplained credit that we had to balance the money, application of funds, was less by the amount of \$965.00 than it would have been. So, when you use the word "charge", it's incorrect. We credited that entire amount as available to her.

Q. Now, the husband's earnings before the separation in 1943, how did you treat those, the husband's earnings in 1943 before the separation, how did you treat those? He went to work in June, July or December. How did you handle that income?

A. Just as they are handled on the return.

Mr. Marcussen: Do you recall now whether they are on her returns?

(Testimony of Paul W. Tormey.)

The Witness: I think he is talking about the year 1943. Let me check my schedule.

Mr. Marcussen: All right.

The Witness: We show no salaries received in 1943 at all.

Q. (By Mr. Crittenden): You did not handle any sums there at all? A. No.

Q. And none of the money that he received after the separation or after the divorce was treated at all as any income of my client? A. No.

The Court: I don't understand any of it was ever treated as her income.

The Witness: None of it was treated as her income except for protecting her on the Application of Funds statement. [306]

The Court: That use was to her benefit?

The Witness: That is correct.

Mr. Marcussen: And that was for the year of 1943?

Mr. Crittenden: The accounting was done on the income prior to their marriage. They didn't compute any of that in either of the returns.

Q. (By Mr. Crittenden): Now, you didn't treat anything as community property at any time, did you? A. Not to my knowledge.

Q. I see. You didn't at any time?

A. No.

Q. And you realize the business was acquired on credit, half interest of the business was obtained by borrowing money?

(Testimony of Paul W. Tormey.)

Mr. Marcussen: Object to that on the grounds it is calling for his conclusion.

The Court: Read the question.

(Question read.)

The Court: What do you want? You say "you realize."

Q. (By Mr. Crittenden): How is the second half of the business acquired in 1942, do you know?

A. Yes.

Q. How?

A. The taxpayer borrowed some money at the Morris Plan [307] Company and together with three or four hundred dollars that she testified she had in her own savings or in the Bank at the American Trust Company, she paid for the half interest in cash.

Q. Was it secured or unsecured?

A. I do not know. The evidence will speak for itself. Whether Mr. Jost endorsed the note or not, I don't recall.

Q. Now, you used these four values that were in evidence in Exhibit "B" in your computations there, that is the four bonds used in acquiring the property from Mr. Hyman?

A. That is correct. I mean, I have made allowance for them in all of my computations. They were acquired in the year 1942 and disposed of in the year 1943, so that for my purpose, they were cash. There was no interest turned on them and they were in and out.

(Testimony of Paul W. Tormey.)

Q. Were there any other Government bonds that appeared in the account?

A. Yes. During the year 1944 the taxpayer purchased or paid out for an item identified on her books as "U. S. bonds," the sum of \$243.75, which I so show on the final balance sheet for December 31, 1944.

Q. Now, I take it in your accounting you treated gambling losses as money that was not part or equal to income from gambling in any way?

A. I can't understand the question. I am sorry.

Q. Well, now you charged all moneys that she lost in gambling as income to her, didn't you, that she must have had the money to have lost it?

A. My application of funds statement in so far as gambling losses were paid out by check or were testified to by Mrs. O'Connor as having been paid in cash. They are a part of the debts and the Application of Funds statement and, therefore, would result in income, yes.

Q. And in net worth the same way?

A. They would appear as an adjustment to the increase in net worth, yes, sir.

The Court: In other words, there would be a balancing?

The Witness: Yes, after the increase had been determined we increased it.

Q. (By Mr. Crittenden): That is an assumption that there were no gambling winnings?

A. It was more than just an assumption. We made every effort to verify any gambling, wrote

(Testimony of Paul W. Tormey.)

letters to every person Mrs. O'Connor named as having won money to her or lost money to her and so far as I know, nobody was ever able to verify any of her gambling moneys.

Q. I now show you this discrepancy evidence which is exhibited in evidence, exhibiting \$680.00 gambling winnings [309] and \$61.47 as either gambling or collecting something.

A. You can very readily establish that that is in the handwriting of the taxpayer's attorney, Mr. Maurice Hyman, and is his own itemization of what the taxpayer chose to tell him about that money. We have no reason to believe that was gambling winnings, except the taxpayer's own self-declaration.

The Court: In other words, you didn't use it?

The Witness: We didn't use it.

The Court: All right.

Q. (By Mr. Crittenden): In your net worth statement how much of the physical assets did you consider were exhausted in that accounting period in the form of depreciation or obsolescence or any other matter and would it be reinvested in another form, having been used in the business?

A. For the purpose of our computations, all of the assets taken on to the net worth statement appear at their cost value and the only ones who are adjusted for are those on which depreciation is authorized by law, being the building and the fixtures and for those proper depreciation reserves were set up for each year.

(Testimony of Paul W. Tormey.)

Q. Did you answer how much the items were and what they were?

A. Yes, sir. Well, on line 48, depreciation in business. [310]

The Court: Line 48 of what?

The Witness: Exhibit L, being the——

The Court: All right. Exhibit L, line 48.

The Witness: It shows the adjustment for the depreciation in business for \$39.00 in 1942; \$7.00 in 1943 and \$103.65 in 1944 for a total of \$220.65. It shows for 1943 on line 48, "depreciation in building, \$120.00; 1944, \$480.00; total \$600.00."

Q. (By Mr. Crittenden): Those are the total amounts of complete depreciation that you have filled out? A. That is correct.

Q. Now, can you give me the amount, total amount of money which you found had been expended or as you would have called corrected business receipts during the year 1944 for Mrs. O'Connor? You have a computation there of all the moneys that you found went through her bank account or paid out by check or cash in any way?

A. The question is quite complex, but I think I can answer it there. Do you have those detailed Application of Funds statements?

Q. You have them in your worksheets, haven't you, where you total up the amount that went through the banks?

A. You want to know what the corrected income was that went through the bank? [311]

(Testimony of Paul W. Tormey.)

Q. Let's take the corrected income that would reflect the amount that went through her hands?

Mr. Marcussen: Are you computing anything such as corrected income on these schedules?

The Witness: Yes, we testified this morning her adjusted net income.

Q. (By Mr. Crittenden): All right, will you give me the amount?

A. That will not be responsive to his question. He wants the total amount of something and this is the adjusted net income.

Mr. Marcussen: Give him the net worth. Do you want the net worth?

Mr. Crittenden: No, I don't want the depreciation taken off there. I want the items there as business income.

Mr. Marcussen: Define business income.

Mr. Crittenden: The amount of money you found that she had in her hands either through the analysis of the bank statement or the disbursements shown in the books or your audit?

The Witness: Her deposits for 1942 after giving allowance for returned items in it?

Q. (By Mr. Crittenden): I want '44, if you have it?

A. I thought you wanted it for all the years. In 1944 [312] Mrs. O'Connor deposits to the Bank of California after making allowance for a return deposit, taking adjustment of \$20.00 was \$38,232.89.

Q. May I have that sum again?

A. \$38,232.89.

(Testimony of Paul W. Tormey.)

Q. Have you the other sums that passed through her hands not by the bank?

A. She made cash disbursements of \$39,310.26.

Mr. Marcussen: What was that again, please?

The Witness: Wait a minute. That is the total for all three years. Excuse me. Could you correct the record on that? For the year 1944, her cash disbursements were \$13,684.24.

Q. (By Mr. Crittenden): Now, to arrive at the amount you would add the amount that went through the bank plus the cash disbursements and that would give you the total amount of moneys she received or expended at that time?

A. That isn't correct, Mr. Crittenden. We have explained that the deficiencies herein are calculated on an Application of Funds method. It has no connection with deposits to the bank necessarily. You are recalling the criminal trials in which the income was calculated on a cash disbursements and deposits method. They will bear a striking similarity, but they will not come out the same and in any event you would [313] have to add the amount of the gross receipts handled for her by Mr. Hyman in the apartments and take into consideration the amount of the expenses paid for her by him and any transfers back and forth.

Q. Now, you start with a bank balance of \$38,232.89 on cash disbursements?

A. \$13,684.24.

Q. Then you have to adjust from that the Hyman transactions?

(Testimony of Paul W. Tormey.)

A. I didn't make my calculations that way, Mr. Crittenden. You asked for the deposits and I gave them to you.

Q. I understood you computed this originally by analyzing the bank deposits and disbursements that were made, not through the bank, but by cash. You would add the two together and that would give you the amount of money that was disbursed through her hands?

A. For the purposes of the criminal trial, the gross business income was determined that way.

Mr. Marcussen: The deficiency notice, the income in the deficiency notice was not computed that way?

The Witness: No. Computed on the Application and Sources Funds statement.

Q. (By Mr. Crittenden): Now, this computation that you have is the amount of money or cash in the bank and we would have to correct that [314] with the amount that was obtained and handled through the real property to adjust it to that other method that you have there?

A. That is right.

Mr. Marcussen: I object to that as putting words in the witness' mouth. He testified he didn't use any such method and if Mr. Crittenden has a method, he can put it on by competent evidence. This witness has made clear he made no such computation and what Counsel is attempting to do is lay a ground for impeaching him on some testimony that is before your Honor and appears in

(Testimony of Paul W. Tormey.)

this record given by this witness and the witness Krause in the criminal trial and this witness has testified that the method of computation for purposes of the criminal trial was entirely different.

Mr. Crittenden: Now, I have several days of examination. I don't want to go through those again and I am trying to see how we can tie those in and save the trouble of going through it again.

The Court: We are not going through that, if it is like what we have been going through.

Mr. Crittenden: I don't want to go through it.

The Court: Now, I will say this about the argument of the Counsel over there. I hear what the witness has said and I have heard his testimony about how this is set up. I have followed it fairly well, I think, under his method. [315] I haven't tried to carry all those figures—it would be impossible—but I followed that through. Now, I don't know what Mr. Crittenden is going to set up as his contention of what does show as the correct income at all. Now, he has asked the witness for certain figures. Now, this witness knows what he did. He knows how they are. He indicates rather a thorough familiarity with the situation. The questions can be asked. This is cross examination. If he has the figures that Counsel is asking for, he can give them. If he doesn't have them, why, then he can say so. If he doesn't understand what this Counsel is after, he can say that and I think he has done that.

(Testimony of Paul W. Tormey.)

Mr. Marcussen: Very well. I will withdraw the objection, your Honor.

The Court: So, the witness will give due regard and attention to the questions and then we will let him give his answer, if he has it. If he doesn't, why, he can say so. All right, read the question.

Mr. Crittenden: Let me withdraw this question.

The Court: All right, withdraw it.

Q. (By Mr. Crittenden): You remember you testified as to the amount of the corrected business receipts for each of the calendar years on the District Court trials. How do they compare and can they be compared with these figures you have been testifying [316] to here?

A. I think they can be compared all right. I have made some comparisons.

Q. Will you show me how you compare the comparisons and compare what is the differences we have between them?

A. I don't have the comparisons between the ninety-day letter and either of the trials. I have a comparison made with the cash disbursement and deposit method of determining income, if you would like to see that.

Q. I take it, it was your from your audit from the figures you testified were used in making this ninety-day letter, was it?

A. That is correct.

The Court: That has been pretty carefully followed here from his sheets here and on direct.

Mr. Crittenden: That is right.

(Testimony of Paul W. Tormey.)

Q. (By Mr. Crittenden): Now, there was various testimony that was gone into in the District Court Trials as to the corrected business income. Was that the same item as you gave here as net income? A. No, of course not.

Q. Well, now, let's see what was different from it? A. To review it just briefly——

Mr. Marcussen: Would you like to be shown what [317] statement you made in the District Court for the net income? Do you have it in mind?

The Witness: I have it in my working papers, but it isn't——

The Court: Let the witness answer.

Mr. Marcussen : Very well, if he can answer it, he will answer it.

The Witness: This morning, by the Application of Funds method, we introduced our evidence as to the additional business income because all of this unidentified income was added to the taxpayer's business receipts; so, that was one stage and that is all shown on Exhibit "J".

Mr. Marcussen: Do you want to refer to the amounts, Counsel?

The Court: Let the witness answer this. Now, this Counsel is doing the questioning. If he wants amounts read, he will say so. Just leave him alone.

The Witness: So, on Exhibit "K", we come down to the total receipts item which appears on line 17 and you will see that the income business receipts, as disclosed by the return, have been in each year increased by the amount of that uniden-

(Testimony of Paul W. Tormey.)

tified income from Exhibit "K", \$7,214.13; in 1943, of '42, \$17,821.99; in 1943, \$22,596.49.

The Court: In 1944?

The Witness: In '44, yes, sir. [318]

The Court: All right.

The Witness: Now, then, after adjustment to inventory, merchandise bought for sale, supplies and other costs, salaries and wages, taxes on business losses, bad debt, depreciation, rent, repairs and other expenses, you come down to your corrected business income and you can see the answer here on the schedule. Would you like me to read those?

Q. (By Mr. Crittenden): Go ahead and read them.

A. So that a corrected net profit from business for the year 1942 was \$6,032.77. The corrected for 1943 was \$22,224.22 and the corrected for 1944 is \$30,223.49. Now, that business income is only a portion of her adjusted net income which would include salaries from her husband, interest received, rental income and her statutory deductions and also in one year partnership income. So, when you asked me the question I had to explain that this Application of Funds method derived the amount of unreported business income. We transferred that to the business income and then proceeded to adjust the whole matter on the merits of the respective items.

Q. I have a worksheet there, showing corrected business income to which you referred when your

(Testimony of Paul W. Tormey.)

Counsel asked you that question, if you knew what I was referring to? A. Yes. [319]

Q. Will you open that up and show it to me?

A. It's in my brief case. May I get it?

Q. Yes.

A. That will be items that were testified to at the first criminal trial?

Q. Yes, and also at the second trial, too. You were asked questions on corrected business receipts?

A. I answered questions as to what I testified to at the time of the first trial. This isn't the right case.

Mr. Marcussen: Just stay where you are. We will get it for you.

The Witness: It has my initials on it.

Q. (By Mr. Crittenden): You have there corrected——

A. No, that is the tax item. You don't want that.

Q. I want the corrected business income for the year 1944. In that you deducted corrected business expenses to arrive at the business income?

A. I will come to it in a minute. Here is a memorandum made of what I testified to. How would that be?

Q. Well, let's get the computation and compare it with 1944. Is it corrected gross?

A. It's just about the same. The bank—this is reading from my memorandum of my testimony of 1944 which should be in the record in the second trial. [320]

(Testimony of Paul W. Tormey.)

Q. That is right.

A. Bank deposits plus cash expenditures were \$50,343.45.

Q. Now, let's take 1944 here and see where the figure, where the gross receipts of the business are?

Mr. Marcussen: Let the record show that you are referring to Exhibit "J".

A. It won't appear there.

Mr. Marcussen: Why won't it appear there, Mr. Tormey?

The Witness: Because this was prepared on the Application of Funds method and we only used the balance remaining in the bank department at the end of the year as the funds applied and the balance at the beginning of the year is the source of funds.

Q. (By Mr. Crittenden): Now, here is the total receipts under business?

A. 1944 corrected. It shows \$53,948.97.

Q. What was the figure you gave?

Mr. Marcussen: You are referring to column on Exhibit "K" under the heading "Total Receipts?"

A. \$53,948.97 and the bank deposits plus cash disbursements that were used for purposes of this trial is \$50,343.45.

Q. Now, this is a difference there of about \$3,600.00?

A. Well, I can give you just an opinion. I have never [321] made the comparison. There isn't necessarily any relationship between the deposits used for this method. It may or may not include all of

(Testimony of Paul W. Tormey.)

the actual deposits to her Morris Plan account. I think for the purpose of the criminal trial they reduced them by every possibility of a transfer by the entire partnership income that might have gone into her deposits, all sorts of adjustments, so that there wouldn't be any possibility of offending the taxpayer.

Q. Now, will you give me corrected business receipts for the year 1943 that you testified to as comparable for the same period in your cash audit?

A. These are corrected business receipts. The figure I will give you will be deposits plus disbursements.

Q. All right, deposits plus disbursements.

A. \$44,187.65. That was Tormey's testimony at the trial.

Q. And here it shows total receipts for the year 1943 of \$48,064.67. Why is there a difference between this figure in Exhibit "K" on line 17 under column 5 and this figure which you have given me here?

A. Well, there can be a lot of reasons. You don't make up your income tax returns on the basis of your bank deposits and cash expenditures, Mr. Crittenden. You make it up on the basis of what the books showed as receipts and in this case, the corrected business income is what she spent, not what [322] she put in the bank. Where she spent from all sources, whether it went through the bank or not.

(Testimony of Paul W. Tormey.)

Q. Doesn't this include through all sources in 1943 or '44?

A. It probably doesn't have any connection with the income or expense out at the Baker Street apartments, for example, it doesn't take into consideration any of those.

Q. Rents are a second column above that, aren't they, or do I misunderstand you? Now explain this to me?

A. This figure having been derived from a detailed source and Application of Funds statement would include every item of expenditure which is in evidence there of either cash or credit. It's used to increase an asset or decrease a liability. All right, this figure of bank deposits is restricted, as I recall it, to simply her commercial bank account deposits.

Q. This covers all bank deposits plus expenditures?

A. It may not have it. Let's see if I can find the detail of it. I have got it some place, but it wouldn't necessarily have all of her income such as the Application of Funds statement did have.

Mr. Crittenden: Your Honor, if I could put these in evidence—in short if you could let me write my brief on this, it will save some time.

The Court: I don't know what you are putting in the [323] record.

Mr. Crittenden: I want to know if his work sheets that we are inquiring about—I think we can answer a lot of problems.

The Court: Maybe it will.

(Testimony of Paul W. Tormey.)

Mr. Crittenden: Just the work sheets in evidence and let me work through them.

The Witness: These aren't my work sheets. They belong to the Penal Division.

Mr. Marcussen: I object to putting those in because it will be cluttering the record.

Mr. Crittenden: It's going to save a lot of time because, if I don't, I have got to ask him questions.

The Court: It isn't going to save me time. Then I will have to make an audit myself.

Mr. Marcussen: If your Honor please——

The Court: And I am not in the auditing business.

Mr. Marcussen: And in addition, if your Honor please, the Accountant, Mr. Nettle, to whom Counsel has referred, is sitting now in the courtroom and the purpose is merely to take all these audit papers and then have him make them available to Mr. Nettle, who is sitting here and then make an argument based upon that. I submit, if your Honor please, that if Counsel wishes to refute these statements, he should have had Mr. Nettle there through the entire [324] trial and then put Mr. Nettle on to point out the errors that Counsel himself doesn't understand and Counsel for the Government would have an opportunity to cross examine Mr. Nettle.

* * * * * [325]

[Note: Here follows a protracted colloquy between counsel for the petitioner and the presiding Tax Court Judge relative to the former's request and insistence upon putting into the

(Testimony of Paul W. Tormey.)

record, over the objection of Government counsel, all the voluminous detailed working papers, worksheets, audit papers, etc., made up and used by the Commissioner's special intelligence revenue agents upon investigating the taxpayer's case; and the Tax Court's denial thereof and sustaining the objection of the Government counsel, principally on the ground of Petitioner's counsel's lack of adequate preparation of his case, as stated by the presiding judge. Thus, the following are submitted as examples:]

* * * * *

The Court: Now, Mr. Crittenden, I will hear you?

Mr. Crittenden: No accountant is any better than his figures that go to make it up. These are where the figures are I am going to show in my brief, where a lot of things I can show are. I can show what this is like and I want to put it in the brief and I can spent a lot of time——

The Court: The Court is not going to be burdened in going through worksheets and notations in that manner. Now, you were giving those results. You know what your client had, so far as any records and so forth are concerned. You knew generally what the setup was because you had been through it and in the criminal trial insofar as the operations of the business were concerned. You also were aware of the apartment properties. You knew of the Morris Plan Bank handling and you make

(Testimony of Paul W. Tormey.)

no move to procure those matters, if they were needed for the purpose of proceeding and showing what the actual operations of this Petitioner were prior to this trial. What you want to do now is very obviously what should have been done before this trial and this Court is not going to indulge in an auditing of a group of worksheets or testing and checking an audit that is made in the course of the preparation of a brief. So, I am going to sustain the objection on that. Now, I will say this further: I have [327] listened to your cross examination with respect to those work sheets for the purpose of showing that they were glaring errors in there and I haven't heard any. I haven't heard any. As a matter of fact, the testimony that has been adduced here on cross examination has shown, with respect to most of the items, very obviously that where there were cases of doubt, the adjustments have been made in favor of this Petitioner, so far as the cross examination shows and that would have to be the basis of justification, then, for the putting in of these worksheets and going to such trouble of an audit in the case in connection with the filing of brief.

Mr. Crittenden: I may have made myself misunderstood. I thought I had proved on cross examination that this man had taken a particular column of figures which were not all the same as any of these figures and taken them and put them together and made this.

The Court: You haven't.

(Testimony of Paul W. Tormey.)

Mr. Crittenden: I thought I had. I am going to take a lot of time in cross examining to show that has been done and I thought I could go through and show your Honor in a brief that some of them are outstanding, glaring examples rather than to take the time doing that.

The Court: Your cross examination hasn't demonstrated anything even approaching that. [328]

* * * * *

The Court: All right. That demonstrates the fact of what I am speaking of that when you go through a book like that and expect that sort of thing to demonstrate that these figures and results are wrong, you haven't done it; and when they come that close to it, considering the state of that book, it is a reasonable conclusion that those figures worked out over a period of time when they were screened very thoroughly and have been demonstrated on this cross examination of what is in that book.

Mr. Crittenden: Just take for example—I know what I am driving at on this thing. [339]

The Court: All right. Now, wait a minute. Wait a minute. I am not going to argue with you on that. I am not going to argue with you on that, so let's just end this and get on with the case. Now, you make up your mind what you want to show by the evidence of record and proceed to put it in and I am not going to argue with you about that any further. Let's get along with the case. Now, put in your evidence. Now, you have had your cross

(Testimony of Paul W. Tormey.)
examination here so far and I have followed it, the details of it. It is in the record and I will get at that when I come to considering your request for findings of fact and I will test your request against this evidence. But, I am taking evidence here now that you have prepared for your case and if you have any more cross examination of this witness, why, let's have it.

Mr. Crittenden: There will be no more cross examination.

* * * * *

Redirect Examination

Q. (By Mr. Marcussen): Now, Mr. Tormey, it is my understanding that these detailed working papers from which you have testified and which have not been admitted in evidence were prepared in the first instance by Mr. Krause and that further information was [340] obtained in the course of the audit by you and Mr. Krause and representatives from the Collector's Office and that that further information was obtained on the basis of checks with outside parties to audit the taxpayer's records and that you, thereafter, you or other representatives discussed those items with Mrs. O'Connor and ascertained certain adjustments that would have to be made to your original working papers and that those adjustments were thereafter included in those working papers that are the subject of conversation here, is that a correct statement?

A. Yes, that is quite correct. This is a case that originated with the Collector's Office. A Deputy

(Testimony of Paul W. Tormey.)

Collector was first assigned to assist Mr. Krause and some of the working papers were headed up and the distribution columns by this Deputy Collector and some of the figures put in by Mr. Krause. Some of them are completed by me. Then, after our staging of our first interviews with the client and going around to verify her purchases——

Q. Are you referring to Mrs. O'Connor when you say "the client?"

A. Yes, sir. After verification of certain matters with the Taxpayer, corrections were necessitated; so, in almost every year under review another set of supplementary schedules were made. Then at the later conferences with the taxpayer, later verifications with people like Lachman Bros. [341] and the liquor stores, other suppliers, we cautiously had to make still further corrections. So, in most of the years there are three complete sets of schedules which have the detail in them. In none of those years did we want to repeat the enormous amount of details, so we limited it to some form of getting those corrections on to the backs of schedules.

Q. Very well. Now, I think you testified that there was an overstatement on the taxpayer's returns of cost of goods sold in the amount of \$1,984.79 for the two and a half years covered by this audit, is that correct?

A. Can you repeat the figure for me.

Q. \$1,984.79.

A. That is the figure, \$1,984.79.

Q. That appears? A. On line 23.

(Testimony of Paul W. Tormey.)

Q. On line 23 of Exhibit "K" in column 12, does it not? A. Yes, sir.

Q. And it is the difference between the items shown in columns 10 and 11, is that correct?

A. Yes.

Q. Yes. Now, then, after you had testified to those, I believe Judge Turner, as the record will show, asked you whether that was the ending inventory at the end of the period and I think you said "yes", and do you wish to correct that answer? [342]

A. What I intended to say was that after giving effect to the actual pending inventory, it amounted to \$5,808.04.

The Court: Well, I think if you will refer back to the record when we get a transcript, you will find that my inquiry was directed to the \$5,000.00 because that is what I understand to be the inventory at the end of the two and a half year period.

The Witness: Then that would be my mistake. I didn't want there to be any doubt as to that.

The Court: I don't remember your other figure. I do remember the \$5,000.00 as being the inventory at the end of the two and a half year period.

Q. (By Mr. Marcussen): Now, then, you were interrogated about an item which appears in column 3 of your Source and Application of Funds statement which is an item in the amount of some \$985.00 for the husband's salary which you have in there?

(Testimony of Paul W. Tormey.)

A. \$965.00 appears on line 5 of Schedule of Exhibit "J", yes, sir.

Q. Exhibit "J". Very well, and that is for the year 1942, is it? A. Correct.

Q. And am I correct in the understanding that if that item were not included on this Schedule, it would actually result in a computation of an increased amount of additional [343] income by that amount, is not that correct?

A. That is quite correct.

Q. It does not have the effect of including in her income the \$985.00, does it?

A. \$965.00?

Q. Sixty-five, yes.

A. No, sir. It restricts the calculations of additional income and it has no bearing on the matter that the entire \$1,380.00, as earned by the husband had to be reported on the joint returns.

Q. And it is based on the assumption that all of the husband's salary to that extent was actually used by the Petitioner in her business?

A. That is correct, at least it was available to him.

The Court: And what is the net report of result of that insofar as the determination of income is concerned?

The Witness: The Government's determination is \$965.00 less than it might have been.

The Court: Yes. All right.

Q. (By Mr. Marcussen): Now, you were inter-

(Testimony of Paul W. Tormey.)

rogated about bonds, certain bonds embraced within Exhibit "B", I think?

The Court: Just a moment, before you get to that. In other words, is this correct: If you assume that he took that amount, the husband, out and spent it for his own [344] purposes, why, then the result is that she would have had, if you had given effect to that spending by him, she would have had that much more income?

The Witness: She would have had to have that much more income by this method to have done what she did and consequently her tax would be greater.

The Court: All right. I want to make sure that was the result.

Q. (By Mr. Marcussen): Now, referring to Exhibit "J", which is the statement of the Source and Application of Funds, I will ask you and also referring to bonds to which I have just adverted a moment ago prior to his Honor's question, can you tell me whether they are included in the statement of Source and Application of Funds for the year 1942? A. Not for 1942, no, sir.

Q. And can you tell me the reason why they don't appear there?

A. To our knowledge, there were not any purchased in 1942.

Q. Oh, I beg your pardon.

A. In 1943 they likewise do not.

Q. They do not appear in 1943?

A. No, although I had knowledge of the bonds

(Testimony of Paul W. Tormey.)

and had the numbers on at least two of them which were purchased [345] through her Morris Plan account, but the evidence of the taxpayer, confirmed by the Attorney who held the mortgage, was that these bonds were turned over to act as part of the purchase price of the Baker Street property. Therefore, having bought in 1943 and sold in 1943, they are in-and-out items which do not appear on this statement. The proceeds from them, however, are represented in the asset of the 2710 Baker Street property.

Mr. Marcussen: That is all.

The Court: Any further questions?

Recross Examination

Q. (By Mr. Crittenden): Mr. Krause made the first spread or just the spread of the first checks?

A. So far as I know they were made subsequently by Mr. Krause and Deputy Collector Ralph Moore and he may have been assisted by Mr. Washauer. At least, Mr. Krause will be able to tell you which ones he made.

Q. The ones you have in your hand, those ones you testified from, there is an original spread and you said some were in Mr. Krause's handwriting?

A. Some of them in Mr. Krause's handwriting I identified.

Q. Those were the spread of the checks?

A. For the particular month we were looking at. I can't tell you now whether all of them were in his writing. [346]

(Testimony of Paul W. Tormey.)

Q. Can you look now and tell me which is his work and which is your work?

The Court: Now, what is it you want him to look at?

Mr. Crittenden: The first spread for each of the years 1942, '43 and '44 of the checks and cash expenditures, the original spreads that were made.

The Court: The use of the term spread——

Mr. Crittenden: Well, worksheets where he spreads each one of the checks to the various columns or accounting terms.

The Court: Do you know what he is asking about?

The Witness: He seems to want to get the identity as to who made what, I don't know.

The Court: Well, see if you can tell him.

Q. (By Mr. Crittenden): Let's take the first ones that you first started with?

The Court: Now, first what?

Mr. Crittenden: He testified here on redirect examination that these accounts were first made up and two more were put on top of them where they were consolidated and corrected and adjusted and I want to find which was his first.

The Court: Well, do you have the worksheets segregated according to who made them?

The Witness: No, sir, except that I could——

The Court: Are all of your work sheets that you use for these purposes there?

The Witness: As respects the checks and cash disbursements, yes, sir.

(Testimony of Paul W. Tormey.)

The Court: Well, can you answer his question?

The Witness: I can answer his question generally.

The Court: All right, give him the best you can.

The Witness: The original listing of checks and cash disbursements for the year 1942 and '43 were done either by Ralph Moore or Mr. Krause and I did the most of the listing for 1944, as I recall it. I will look and see. No, I didn't do the original. Mr. Krause must have done this one.

The Court: Now, what is that?

The Witness: It is the first listing of the checks drawn by the taxpayer and checking them into her cash book, the brown book, in 1944, in so far as we could, and in each year there's one or two sheets like that for each month. Then I came along and made a shorter detail applying a restriction of some of those expenses which have been taken care of in testimony with the taxpayer and subsequent to that we summarized both of those sheets and then applied this detail to the final summary that was used for the purposes of building up your Source and Application of Funds statement which is here.

Q. (By Mr. Crittenden): Which is the top sheet you have here? [348] A. That is right.

Q. Marked a summary of disbursements as per the—— A. Taxpayer's cash book.

Q. This is what you mean by the second or third sheet that you made? A. That is right.

Q. You carried them across here under column

(Testimony of Paul W. Tormey.)

such as total amount of liquor, wine, beer, tobacco, food, personal drawings?

A. No, licenses and taxes.

Q. And utilities, wages, advertisements, general expenses, miscellaneous items and amount and under miscellaneous items, you have various ones broken down by name? A. That is right.

Q. Now, in the original spread, let's go back to one of those, as an example on the lefthand column, was broken down into the number——

A. Check number, that is the date, rather.

Q. The check number, the amount and on the right there are a number of columns headed "liquor, wines, beer, tobacco, food, etc.; food drugs, license and taxes?"

Mr. Marcussen: "Personal drawings," excuse me.

Q. (By Mr. Crittenden): Are license and taxes, utility, wages, advertising, miscellaneous and under that, explanation and amount and in [349] two columns on the left "explanation" and on the right is "amount" and on the bottom you have run a total of each of these columns except that is including the column of the checks? A. Why, of course.

Q. Now, these are the checks again on the left that I am turning to here. This is by a certain amount.

The Court: Now, those are amounts that are taken from her check book, I take it?

The Witness: They appear in the check book and in some of those instances in the bank book and he verified each one had a withdrawal from the

(Testimony of Paul W. Tormey.)

bank account itself. In fact, the checks themselves are in evidence.

The Court: Yes.

Q. (By Mr. Crittenden): Now, your analysis of your cash disbursements are on which sheet here? These are all checks, I take it?

A. The preliminary ones are put down here in combination of totals. I didn't do this work, but I understand it. They gathered those cash disbursed items together by a little scratch sheet and entered the totals of each classification here, you see.

Q. That means like for instance on the total disbursements, this is marked "date, 1944, July," and you have items here of check numbers from 77 down to 192, isn't it? There is a break here with some of them unnumbered. Then [350] underneath it you have the total of checks and the total, as you have spread them here, and under them you have written "Pabst?"

Mr. Marcussen: Just a minute, I don't think there was a record of Pabst.

Q. (By Mr. Crittenden): "Pabst, San Francisco Brewery", Bill and Luckey with the sums of each one of them and then, for instance, under amounts here you have \$1874.81—— A. 86c.

Q. Excuse me, and then carrying on to the right under liquor there is the sum of \$37.64 and under wine—— A. There is nothing.

Q. There is nothing.

You have listed the wines under "beer." Under

(Testimony of Paul W. Tormey.)

"tobacco" there are two figures, one of them the check totals. A. No, two items.

Q. \$55.60 and \$171.19. Then after that comes under "personal drawing", "party, \$25.00; food, \$17.25?" A. \$17.75.

Q. Excuse me, \$17.75. "Rose's insurance, \$20.00; Mam's something, \$100.00?"

A. Mam's train trip.

Q. Miscellaneous, \$21.50. Nothing under licenses and taxes, nothing under utilities. Under wages there is an [351] item of \$527.00 which appears to be under cash disbursed line?

A. That is right.

Q. A sum of \$384.60 under checks. Under cash item \$527.00. Under advertising——

Mr. Marcussen: Are you reading the paper into the record? May I ask what the purpose of this is?

The Court: Let him go ahead.

Q. (By Mr. Crittenden): Under advertising there is a cash item of \$23.75. Then under miscellaneous where it says "explanation" there is "paid Hyman on Baker Street, \$500.00." Auto expense, \$13.75; garbage, \$5.00; supplies \$48.07; laundry, \$3.81, and then at the very bottom there are totals of both the cash and the check payments for each one of the columns. No use reading those into the record. It's an arithmetical total. I take it most of the sheets are identical in the method in which they are handled like for instance under "miscellaneous", everything is explained and under "cash items" many of them have names opposite them like when

(Testimony of Paul W. Tormey.)

it is liquor and wine; but if it is under "wages", it's just a grand total, now, where you make a spread of the totals to which you were testifying before you made a second spread on this, didn't you?

A. Yes. On which year do you want it?

Q. Well, for instance, February of 1943—we started with which page? Does that start—Oh, that was the second [352] spread again?

A. It's in the middle here some place.

Q. Now, on this page to which you are referring in February of '43, in the middle of the page, those double lines above and below the date of February and after that, is that the date column, Mr. Tormey?

A. Yes, sir.

Q. I notice here that the dates are February 1, 2, 31, is that 31?

A. That is right.

Q. 31, 3, 15, 31 and 31. I take it something happened on the 31st day of February?

A. Get the book and I will show you what I mean.

Q. I am asking you if that is what this entry means?

The Court: Let him have the book.

Mr. Crittenden: All right.

A. Well, there doesn't appear to be any total in here now. They give evidence of having been rubbed out. In any event this 31 refers to this re-numbering of the days and the month.

Q. This date particularly in February over here?

(Testimony of Paul W. Tormey.)

A. There is no item "31" in February. If I put down "31", I was in a hurry and forgot about it. I am not very good on the calendar.

Q. Let it appear in the record there are five items [353] dated February 31, 1943.

A. I will show the principle of what is referred to, however. It refers to the fact that cash disbursements were entered in totals from the total column and they did appear on line 31 at one time on that book.

The Court: It is according to line?

The Witness: Yes, sir. The line number appearing on the end here.

The Court: In other words, that is to cover these erasures? They reflected these erasures, did they?

The Witness: They could have, sir. I am dealing with the corrections to the totals of some of these columns and they were written in there and then entered on this work sheet as spread in book, "personal, wages, miscellaneous." For example, that is February. Which one do you want?

Q. (By Mr. Crittenden): I am taking the first one here, February, \$317.00?

A. All right, under personal column, there is a \$7.01 item and an \$65 item under miscellaneous. Here it is, \$70.08 and insurance. The two together were down here in a total some place on the opposite line 31 where it would have been and then I spread those, to corrected items "personal, \$22.50 and \$65.00 to rent 581 Valencia."

(Testimony of Paul W. Tormey.)

The Court: Those represent line on the book?

The Witness: That is right, sir. [354]

Q. (By Mr. Crittenden): Now, you have March 31st?

A. It means the end of the month and the totals, Mr. Crittenden.

Q. You have entries made on the 31st day here? How did you carry those for March '43, the same way?

A. If there was occasion to correct the total of any of those columns from the spread as originally made in the other section that you have already gone over, we would put it down referring to the date. If it was a total—here is \$475.00 under “personal column.” It is no longer there. We had these—\$441.50 something. I can’t find it anyway. Here—no, that wouldn’t be it; but in any event, the principle is that this represented the total of the item as spread in the book. These two over here. Then it is separated by what it should be on here as “supplies”, column 12. Maybe we will find it. That was the \$45.94 according to the book and it’s actually \$44.49 and a \$400.00 error deduction from “personal expense” which we did and you can see where those errors are applied on the final summary sheets, if you are interested. Here, for example, “payments” that are in the book to Morris Plan, overstated, “\$720.00” or reduced from the accounting, \$720.00.

Q. Now, where is this February 1943 mistake of \$400.00 in the column? [355]

(Testimony of Paul W. Tormey.)

A. Well, it's——

The Court: You know, Mr. Crittenden, if you had been as zealous in taking the evidence in this Petitioner's information and data and worked at it from the standpoint of showing what her correct income was, why, then you would have had a sure fire way of showing whether or not that is wrong, but proceeding at it the way you are, you don't.

Mr. Crittenden: I just want to read this in the record, if I may.

The Court: What is it you are going to read into the record, now?

Mr. Crittenden: That February, '43.

The Court: It depends on whether or not I think it to be helpful whether or not I want it in there. Now, what is it you want in there?

Mr. Crittenden: I got one spread and I am putting in the second spread that we handled, February '43.

The Court: What do you mean "second spread?"

Mr. Crittenden: That is what he has done.

The Court: What are you talking about?

Mr. Crittenden: There are two pages that cover February 1943, so, for one of the, I have read and shown what is in the record. Secondly, I am picking it up here, which is the central part and dated the 31st day of February. We had four items of those. [356]

The Court: And for what purpose are you putting it in, Mr. Crittenden?

Mr. Crittenden: If I can, to protect my record.

(Testimony of Paul W. Tormey.)

The Court: In what way are you protecting your record?

Mr. Crittenden: He testified on redirect examination he had taken one set of figures and set them up. Then he had consolidated them with some corrections and put them in a second place and then he had set them up in a third place, two more on top of that, put it that way. Now, I am trying to show what he actually did when your Honor sees this.

The Court: Do you understand what he is talking about, Mr. Witness?

The Witness: I understand that he is attacking this thing on the possibility of error, but it is simply a step of three logical things. We first set down all the checks we could find and spread the cash disbursements on the business for our account as they are on the books. In the light of later events, he took those columns—we had found corrections had to be made. Instead of correcting our entire schedule, he set up that column, being some corrected deductions from the first schedule in addition, in the third column and when we got through making those corrections, we applied the schedule to the first schedule and came up with the base report of our audit. [357]

The Court: All right, Mr. Crittenden, how far are you going in this?

Mr. Crittenden: Just to make the February 1943——

The Court: You are just going to cover 1943?

(Testimony of Paul W. Tormey.)

Mr. Crittenden: That is all I am going to do. Now, show us the page of 31 days of February, 1943?

The Court: I will do my own construing about that, Mr. Crittenden. I have heard the witness and if there is any question about that, let's eliminate argumentative matters.

Mr. Crittenden: Your Honor, I have done everything to hasten this court trial and if I am a little slow on some of these things——

The Court: It isn't a question of that. Let's eliminate the argumentative and the adjectives and so forth. They are very effective other times with a jury, but it is just wasting time here to indulge in them because you don't have a jury here. So, let's just eliminate those and cover substance.

Q. (By Mr. Crittenden): Under this February item, there is 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 items that are spread in the first column, covering the date, the second column being headed "personal," the third being "wages" and the fourth being "miscellaneous." Then there is an item being "description" in the next column.

A. The next three columns. [358]

Q. Excuse me, the next three columns, but there are figures written to the left of it and the words to the right, for instance, like "February 1st" and "\$1.50, Galan Laundry." Then written on the left is "spread" and on the right, "should be" and under the "should be" it says "personal, wages, general expense?"

A. "Contract payable."

(Testimony of Paul W. Tormey.)

Q. "Contract payable", another description of "Galan" goes over here under the column of——

A. "General expenses."

Q. "General expense", "should be" \$1.50, the P.G.E. \$3.25 is carried under the column "personal" on the right and I notice there is an item of \$19.75 after P.G.E. and \$16.71 utilities?

A. You missed the theory of this. The point of this is that the check P.G.E., \$19.75 which appears in the description column appears on the first schedule as a charge to the taxpayer's personal account, to utilities, rather, and we find that only \$16.71 is applicable to utilities. Therefore, the difference, \$3.25, is put into her personal account. Do you follow me?

Q. I follow you. So, after the word "P.G.E." there is the figure with a 19.75-16——

A. Minus \$16.71.

Q. Then it says "utilities" and then under "should be"—— [359]

The Court: Now, just back up a little bit. Is it \$19 some cents and the \$16 some cents?

The Witness: Yes, sir.

Mr. Crittenden: He writes it. I don't think it is in any dollars and cents column.

The Court: You would have your dollars at the top and you know what it is, so we won't quibble over that as to the dollars and cents because that is what you have on that sheet?

The Witness: That is right.

(Testimony of Paul W. Tormey.)

The Court: All right. Let's say dollars. The reporter is having a hard enough time as it is.

Q. (By Mr. Crittenden): The next one is February 2 and it is under a spread "personal \$22.50" and then under "description" it says \$65.00?

A. Under "miscellaneous \$65.00" and the description——

Q. Oh, miscellaneous is \$65.00 and then the description follows as "Milton-Myers-rent."

A. Yes. Will you let me follow the book for you on this, Mr. Crittenden. You see, under column 13 in the black book for February, 1943, there is an item appearing of \$87.50, "rent for Tavern and Apartment 4." Down at the bottom of the page there is penciled in total of \$87.50. We allow that as identified by Milton-Myers-rent, the check portion of it \$65.00 and we allow the charge of the balance \$22.50, personal [360] Apartment 4, upstairs." Under column "other" there is \$65.00 and after that the words under "description," "rent-571 Valencia." The next is an item, date, February, 31, and it's under column "personal" for \$7.01 and then under "miscellaneous" \$65.00, under "description", "insurance;" then on the right where it should be is "personal, \$7.01" and under the column "other" \$65.00 and description under that, "fire insurance."

Q. Then we will just take the last item to save a lot of reading in here. February 31, under column of the "date" and under column as spread, showing "wages, \$315.00"; under "description" wages and under "should be"—it comes under the wage column

(Testimony of Paul W. Tormey.)

of \$315.00 with nothing under description. Now, your next and I should say there is a double line after that and in between are the totals of the columns on the left, and the columns on the right and the total showing the entire amount of these columns added up with an equal sign showing the total of all of these items, isn't that correct?

A. Each side per book. It might make it more apparent and understandable to show that the books or the previous classification of the books, I should say, had included \$540.96 as a personal expense of the taxpayer, \$315.00 as wages and \$603.16 of miscellaneous items for a total of \$1459.12. The re-determination assigned only \$140.21 as personal items. Wages were \$315.00, no change for some reason. General expense was \$73.91 and miscellaneous items which are detailed above, [361] \$930.00.

Q. Now, you have a third spread on top of this that you followed through that you show us on February of '43, the next page that follows this?

Mr. Marcussen: What month is that?

Mr. Crittenden: February of '43.

The Witness: Simply a summary sheet is all.

Q. (By Mr. Crittenden): Now, that shows on one page, which is the bottom half, marked "1943 Summary" and we will take February. Under the column marked "personal" is the amount of \$540.96. Under wages the sum of \$315.00 and under "miscellaneous", \$603.16. Then at the bottom there are also errors, a column, and then the net for 1943 shows the totals under "personal" and wages and

(Testimony of Paul W. Tormey.)

miscellaneous and then I see it equals which must be the addition of those three columns, isn't that correct, the total? A. Yes.

Q. Now, do you have any more spreads that go on top of that?

A. Those are redistributed on the righthand side.

Q. Under "should be" in February there are these columns: "140.21." Under "personal", wages \$315.00; general expense \$73.91. The column—what is that contracts? C-o-n-t. P-a-i-d. [362]

A. Contracts.

Q. That is blank. Under "other" there is the sum of \$930.00. Now, are there any more spreads or any additions or corrections of February, '43?

A. This "other" column is broken down by the details of it. There weren't enough columns, in other words, to subdivide on one schedule. Actually the total column for the year there, so far as this schedule of restrictions went, was \$6,558.65 and that is made up of the rent and accounting service, painting, insurance, bad checks, a total of \$999.00 of allowable business deductions. It also records the purchases of a piano, stove, ring at Brilliant's, ring at Maxford's, watch at Brilliants; rug and furniture at Lachman's and shrubs for the Baker Street property or capital assets purchased of \$2,218.64; shows the purchase of \$1,101.77 in bonds; \$200.00 Libery Loan; \$500.00 deposit to the William Lewis Liquor Company and \$33.00 for the music change fund; total of \$1834.77 cash or equal. It includes

(Testimony of Paul W. Tormey.)

item marked "gambling, \$2265.90," labeled gambling with a question mark after it; \$795.64 labeled "loans" with a question mark after it; \$444.50 labeled "donations" with a question mark after it. Those last three items totaling \$1,506.24 to be determined the total, as previously given, of all of these items was \$6,558.65 as respects that total. Now, if you want to follow this through, those items were—— [363]

The Court: Are you still on February of '43?

Mr. Crittenden: Yes. We are referring to February '43 items.

The Witness: This was the effect on the change of February '43 items on the total of the items in that column for the summary of the year.

The Court: That is the reason I asked the question. You are on February of '43?

The Witness: That is correct.

Q. (By Mr. Crittenden): All I am interested in finding out is how you take this spread for February '43 and carry it through on your adjustments?

A. I guess that is all there was for '43.

The Court: Now, let me make a suggestion to you for the purposes of your case and the benefit of your client. You had better use a little bit of diligence here in working out what she actually had and where it went and what her income was.

Mr. Crittenden: That is all in the record.

The Court: And then you would be getting somewhere, whereas I can't see that you are here.

(Testimony of Paul W. Tormey.)

Mr. Crittenden: Pages and pages and pages of testimony that are before your Honor that I don't want to read them to you now. [364]

The Court: Why bother with this if you have actually in the record what she actually made and what her income is as evidence of it. All you have to do is argue it on brief. I don't have to have all this matter here being dragged in because your results, if you have got in here a showing of what her income was and what her expenses were, why, that in and of itself, when laid alongside of the results in Exhibit "J" and "K", will supply all the basis that you need for making your argument and that will supply all the basis you need for your conclusion if it is wrong, but go ahead.

Mr. Crittenden: He was asked questions on direct——

The Court: He was asked on redirect how he arrived at these things and who arrived at them and if it was a composite of various things that are there and other adjustments and he so answered. All right, let's get along.

Q. (By Mr. Crittenden): We have all of February '43 out of the way, the different spreads you were referring to before and the corrections and adjustments that you testified to on redirect examination?

A. Are you asking me a question?

Q. Yes.

A. I have no more sheets on it that I can find.

Mr. Crittenden: All right, that is all. [365]

(Testimony of Paul W. Tormey.)

Mr. Marcussen: I have one question, if your Honor please.

Redirect Examination

Q. (By Mr. Marcussen): Do you know, Mr. Tormey, whether a liquor license is required on an apartment establishment such as Mrs. O'Connor was operating during the taxable years involved here? A. I understand so, yes, sir.

Q. Do you know whether they have any value in the State of California?

Mr. Crittenden: I will ask that the witness be qualified.

Mr. Marcussen: I am not qualifying. I am asking if he knows whether they have any value?

A. I know of my personal knowledge they have a going concern value which depends on what you can get for it. They also have a statutory value determined on the license rate which is \$525.00 a year. I know the taxpayer——

The Court: Just a moment——

Q. (By Mr. Marcussen): Do you know whether in the State of California they exchange hands for substantial sums of money?

A. I know it's common knowledge that it does. I haven't any way of proving it, except other cases I have investigated and could refer to the files in those cases. [366]

Q. And do you know of what the value of a liquor license was, say, in 1944?

Mr. Crittenden: We will move that any questions as to this be restricted to the man's knowledge

(Testimony of Paul W. Tormey.)

and if it isn't in his knowledge, we not waste the time of the Court.

The Court: Read the question.

(Question read.)

The Court: What do you mean by that, Mr. Marcussen? I wouldn't know just what you are asking there.

Mr. Marcussen: Well, the taxpayer has purchased the full interest in this bar——

The Court: And I assume that I am talking about your question now.

Mr. Marcussen: I want to find out what was the value—I should say, in 1943—I beg your pardon. I want to find out what the value is so as to give some clue of how much, if any, of the \$615.00 which she paid for the remaining half interest and how much, if any, of the first \$1000.00 she paid for the first half interest might be reasonably allocated?

The Court: All right. I will sustain the objection on that question because he has shown what he did and I have no—there isn't anything here to indicate that this man——

Mr. Marcussen: Very well. It is not part of my burden of proof. With that, I will withdraw the question. [367]

The Court: If you needed to prove that or wanted to show it, why, there would probably be some ways, but I don't find anything from this witness to show he knows anything more about it than the fact he has worked on some cases where

(Testimony of Paul W. Tormey.)

there were some transactions, but I wouldn't consider that as qualifying. Objection sustained.

Mr. Marcussen: That is all, your Honor. * * * * *

CLARENCE L. KRAUSE

resumed his testimony as follows:

Cross Examination

Q. (By Mr. Crittenden): Mr. Krause, you are with the Intelligence Unit and will you describe your job?

A. I am with the Intelligence Unit of the Bureau of Internal Revenue.

Q. You had occasion to make an audit in this case for the second trial?

A. For the second criminal trial, yes.

Q. You have with you the worksheets that cover that particular period of Mrs. O'Connor from 1942 through 1944?

A. I have my worksheets that I used in the second criminal trial for those years, yes.

Q. Now, this is solely informative for the Court. It appears in the record before him which he has not read. You made an entire reaudit of all the accounts and checks and all those records that were in the evidence in the first trial for the second trial, didn't you?

A. I made an entirely new audit from the original [377] basic records.

Q. Now, will you give me from your audit the business expenses for the period from 1942 from the time Mrs. O'Connor took over the business as an

(Testimony of Clarence L. Krause.)

individual, which was the 16th day of July, 1942, to the end of 1942?

A. Merchandise purchased, not considering inventories, \$9,631.86. Wages paid——

The Court: That is for what period?

The Witness: This is for the period of July 16, 1942 to December 31, 1942.

The Court: All right.

The Witness: Wages paid, \$2018.20. Business taxes paid, \$916.81. Supplies purchased, \$306.49. Miscellaneous bar expenses paid, \$1,340.68; gambling losses paid, \$167.50; bad debts, \$42.50; automobile expenses, \$133.10; depreciation automobile, \$339.20; depreciation bar fixtures, \$320.00; total, \$15,216.34.

Q. (By Mr. Crittenden): Now, you computed your business income for the same period for the bar business expense. Will you tell your Honor how you did that?

The Court: What do you mean expense of the business?

Mr. Crittenden: Receipts of the business.

The Witness: You mean for the bar?

Mr. Crittenden: That is right. [378]

The Witness: Yes. I computed your corrected business receipts for the same period. I computed that by taking the taxpayer's bank deposits, net bank deposits after eliminating transfers, redeposits, loans and so forth and adding to that the cash payouts as differentiated from check payouts.

(Testimony of Clarence L. Krause.)

Q. (By Mr. Crittenden): Will you give me the amount of that?

A. The total that I got from the computation was \$15,388.47.

Q. What is the difference between that and expense by your computation?

A. My corrected business income for that period of \$172.13.

Q. Now, was there any income from real property, other income? A. Yes, there was.

Q. Will you give that?

A. We show the salaries received, \$1380.00; Morris Plan Thrift Account interest, \$22.44 and net rental income of \$217.47.

Q. Can you give me the total of that?

A. Total of that would be \$1,619.91.

Q. Was the rental income in there?

A. Yes, rental income was \$217.47. [379]

Q. Did you set up depreciation?

A. Yes, depreciation.

Q. Will you give it to the Court?

A. You want the details?

Q. The details of depreciation?

A. The rent schedule shows rent received, \$303.00, rental expenses of \$50.38; rental furniture depreciation, \$35.15, making a net rental income \$217.47.

Q. Now, Mr. Krause, I will appreciate the Honor states that an account is no better than the items that go into it.

The Court: Who said that?

(Testimony of Clarence L. Krause.)

Mr. Crittenden: Well, excuse me, I thought—we were discussing that earlier when we were saying an account was no better than what goes into it——

The Court: What did you say? You said I said that?

Mr. Crittenden: We were discussing that. Someone said it.

Mr. Marcussen: That is the type of thing that goes in this record.

The Court: Don't you undertake to put words in my mouth. You ask your questions.

Q. (By Mr. Crittenden): Now, do you have sheets showing how you arrived at those deductions and what items go into it?

A. Yes, I do. [380]

Q. Can you show me how it is set up there?

The Court: Now, that sort of thing, Mr. Crittenden, hurts your own case.

Mr. Crittenden: I am sorry, your Honor.

Q. (By Mr. Crittenden): You have columns here showing the deductions that you took and how you arrived at it?

A. I have entire worksheets here. First of all I have listed the checks, disbursements made by check by months.

Q. Are they listed by name and amount?

A. Listed by date, by name, by amount and classified.

Q. And classified?

A. And after that I listed the disbursements made in cash, likewise classified.

(Testimony of Clarence L. Krause.)

Q. And totaled and then grand totaled by each item as they appear in the book or account. Give us an example, will you?

A. I have them listed by dates as they are exactly shown in the book and then I have totaled them by months as to those expenditures in cash, those expenditures in check and then they are totaled together for the entire month. I also have photostats of the book itself with a key shown on the photostat of the book in which the key shows exactly each item shown in the book whether it's been allowed or disallowed, whether it's been found to be paid by cash, whether it's been [381] found to be paid by check. The entire matter is summarized for the total.

Mr. Crittenden: Now, your Honor, I will want to show the items that go into this deduction. That can be done in several ways. I am suggesting, in order to save time, could I have photographs made at my expense of these items of the check and the cash expense to total up to this amount and then put those into evidence instead of putting in the sheets?

The Court: He wouldn't know the answer to that.

Mr. Crittenden: I am asking his Honor if I can.

The Court: I really don't know. You will have to make your own decision. I don't know anything about it.

Mr. Crittenden: We will take each sheet by the month then and will you identify the sheet by the

(Testimony of Clarence L. Krause.)

month, how you made these up, starting in July of 1942?

The Court: Now, what are those sheets he is asking you about, Mr. Witness?

The Witness: These are fourteen-column accounting sheets in which I have listed all the disbursements for the cash, whether cash or whether check and then I have classified them as to the various types.

The Court: Where did you get those disbursements?

The Witness: I got them from the books or from the taxpayer's checks.

The Court: In other words, what you have there [382] you made up solely from what books?

The Witness: From the taxpayer's black book.

The Court: The black book and checks?

The Witness: From the taxpayer's checks.

The Court: Nothing else?

The Witness: Not a thing else on these particular sheets, no, your Honor.

The Court: Now, do I understand that all of those matters are in the record, the checks and the books?

Mr. Crittenden: These and these total them and it saves me the trouble of doing it in a brief and it is done neatly and nicely and I want to put them in this form.

The Court: Make your offer if that is what you want.

Mr. Crittenden: May I have the sheet of 1942?

(Testimony of Clarence L. Krause.)

The Court: Don't tear anything out of there. You want to offer the sheet of 1942?

Mr. Crittenden: July through December. I am starting with July now.

The Court: Oh, all right. You have those sheets.

The Witness: July consists of three pages and the totals for the half month July 16-31. Do you want the figures?

Mr. Crittenden: Well, I thought we could use the sheets themselves now.

Mr. Marcussen: You mean you are offering these sheets in evidence? [383]

Mr. Crittenden: Yes.

Mr. Marcussen: I will object to the offering of the sheets in evidence.

The Court: Let me ask you again, Mr. Witness, do I understand from you that this is a tabulation that you made from the books, this black book that is in evidence and from the checks and check stubs or the checks? Just tell me again exactly what you have got in there?

The Witness: Sure. My source of information was the taxpayer's checks and the black book.

The Court: That is all?

The Witness: That is all. I compared the checks to the items in the black book to ascertain——

The Court: And those are in evidence?

The Witness: Yes, sir.

The Court: All right, the objection sustained.

Mr. Crittenden: It saves the trouble of a computation. I will have to read these in the record.

(Testimony of Clarence L. Krause.)

The Court: You won't have to do any such thing. Your basic records are in evidence. All this is is a tabulation of those things?

Mr. Crittenden: That is right.

The Court: And you can make your own tabulation on that just the same as anybody else and we already have the testimony that this determination here was not made from those. [384] It is a composite of things and I am not going to try to reconcile that, Mr. Crittenden.

Mr. Crittenden: I asked the specific question of Mr. Tormey if all the information he had compiled, the basic matter was in the evidence and he said yes.

Mr. Marcussen: Mr. Tormey, yes.

Mr. Crittenden: Mr. Tormey did. Now, this is the basic evidence, only it's added up and comes to an entirely different result.

The Court: That is his tabulation of it that he made. The evidence is over here.

Mr. Crittenden: That is right. Now, that is all the value of an accountant's testimony at the most is what it contains and how he adds these factual matters together to arrive at a particular sum.

The Court: That is not the determination. It is a part of it.

Mr. Crittenden: It is entirely different than the evidence that was given before.

The Court: Sure, but whatever there is in there, to test the difference you have got it in the record, in the black book and in your checks.

(Testimony of Clarence L. Krause.)

Mr. Crittenden: That is right and here they are all tabulated.

The Court: That is right. All right, that is not [385] competent evidence over the objection of opposing Counsel and that would mean I am going to have to do some auditing and I am not from secondary evidence. I am just not going to do it, Mr. Crittenden.

Mr. Crittenden: This isn't auditing from secondary evidence.

The Court: It is. That is secondary right there; that is what it is. All it is are figures that he says he has taken from original competent evidence that is in the record.

Mr. Crittenden: That is the same thing Mr. Tormey did only he has an entirely different result.

The Court: Mr. Crittenden, all under the sun Mr. Tormey's evidence was is to show for the benefit of this Court the manner in which he arrived at the amounts that went into that determination. They are not even proof of the correctness of the determination.

Mr. Crittenden: I am showing your Honor what the correctness would be if properly added together.

The Court: All right. I don't want to take it from that. Make your determination. That further allows you a margin of error.

Mr. Marcussen: In favor of the taxpayer.

The Court: I don't know. It might be in favor of the Government so far as I am concerned. If it was in favor [386] of the Government, the ruling

(Testimony of Clarence L. Krause.)

would be exactly the same. I don't know now in whose favor it is in. It is not competent evidence and I am not going to take it, particularly when the competent evidence is in the record.

Mr. Crittenden: Suppose I had brought an amount and said I looked at these books and came up with this total. That would have been competent evidence? So much was expense and so much was income?

The Court: It might.

Mr. Crittenden: That is what I am doing here.

Mr. Marcussen: I am not willing that that should be released to Counsel.

The Court: I am not going to take it.

Mr. Marcussen: I will have to deny it.

The Court: I want to know what those records are.

Mr. Crittenden: You don't intend to audit them, I take it?

The Court: I am going to do enough to satisfy myself as to what they show.

Mr. Crittenden: Here is an example where it has all been done to save your Honor the trouble. Maybe I misunderstood.

The Court: You apparently do not understand, Mr. Crittenden, what I have been saying. You have got your evidence in the record. You have a part of it. You have a tabulation that has been made by this witness of part of the evidence and [387] this evidence is the correct controlling evidence so far as any determination is concerned. That is, it is com-

(Testimony of Clarence L. Krause.)

petent and here you have this witness' tabulation that he made up for another purpose, which may or may not understandably tie in with the determination. Now, the point I have been trying to tell you all evening is that if you had prepared your case, you would have taken the evidence at hand; you would have had a determination from that made as to what the correct amount of the income is and then you could have put that alongside of this determination and to the extent that it differed and it was tied in with the evidence here, why, then I could have seen it at once.

Mr. Crittenden: Isn't it the testimony that does that, your Honor? Do I understand that the Government's computations are *prima facie* evidence of that fact. The moment I introduce a book that has different results that can be obtained from it, then I have evidence on which the Court may make its own determination. I may bring in a number of books, receipts or expenditures or checks, which I have done. Then I put on secondary evidence to assist the Court in using that in arriving at a different figure.

The Court: That will not assist me in arriving at what you are talking about because it is a different audit from the one on which this determination is based. I allowed that testimony in only for the purpose of explanation as to how it [388] is set up, not for the truth or correctness of the figures therein stated. I don't know whether they are right or not.

(Testimony of Clarence L. Krause.)

Mr. Crittenden: I don't assume your Honor is going through there and set up every check on a spread and make his computation from this evidence.

The Court: You can assume or not assume what I am going to do in my study of the evidence in the determination of the facts in this case, because that is my job and I propose to do it.

Mr. Crittenden: Well, I realize that, but you would be at this thing for months, I would say, if you had to do that. [389]

* * * * *

The Court: You mean it is going to save you a lot of work if you can get that accepted as being evidence of facts in this case.

Mr. Crittenden: No. The evidence of facts are the books and the account and the testimony of the witnesses as to what each item was and there are pages and pages of that testimony.

The Court: Over objection the documents are not admitted.

Mr. Crittenden: I can see your Honor's position. The only thing left for me to do is start reading these things.

The Court: You are not going to read them from there because I am ruling that out. All under the sun that is is secondary stuff that somebody has used for some purpose. The original evidence, the competent evidence according to your own statement is over there. [393]

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(Testimony of Clarence L. Krause.)

Mr. Crittenden: Well, let's take an example.

The Court: You don't know of any examples. You have gone over it.

Mr. Crittenden: You mean to say your Honor is ruling that it is impossible for me to go ahead and examine as to what items Mr. Krause has put in here to arrive at these different figures on which he has testified?

The Court: Mr. Crittenden, Mr. Krause's audit is not the basis of the determination of the Commissioner in this case that is on trial before me. Now, if it were, the work of an agent would be admissible here for one purpose and one purpose alone and that is to show how the determination was arrived at, not as proof of any of the facts contained therein.

Mr. Crittenden: That is true and just what weight your Honor should give to it when you say that.

The Court: Well, that doesn't help you one iota, Mr. Crittenden. It is up to you to show wherein it is wrong, not from somebody else's listing of these secondarily, but by basic evidence. [396]

* * * * *

Mr. Crittenden: I appreciate that, but I don't want to go to the trouble when it is all tabulated here and assist the Court on this.

The Court: That is exactly the point. You don't want to prepare your case. You want to fool around here with picking away here and there on some figure that is not proof of the fact.

(Testimony of Clarence L. Krause.)

Mr. Crittenden: The proof of the facts are already in the record. Even Mr. Tormey said all his computations were from that basic data.

The Court: And it is scattered all through that record there.

Mr. Crittenden: That is right.

The Court: But it is made up into a final determination.

Mr. Crittenden: That is right and I don't think your Honor is bound by it. On the basic data there is considerable difference between these figures and the figure Mr. Tormey gave. The reason is Mr. Tormey sat down and said so much for a party. I won't allow it. This man says I put in expense for the taxpayer what the taxpayer claimed as gambling losses. [399]

* * * * *

The Court: Let me question the witness again. Mr. Krause, you have made up a tabulation of disbursements, as I understand it, in connection with the operation of the bar?

The Witness: Yes, your Honor.

The Court: And it covers expenditures as you tabulated it from that book over there?

The Witness: From the black book, yes, your Honor.

The Court: And his checks?

The Witness: Yes, your Honor.

The Court: When did you make it?

The Witness: I made this in December of 1947.

The Court: In December of '47?

(Testimony of Clarence L. Krause.)

The Witness: Yes.

The Court: What did you make it for?

The Witness: For the purpose of the second criminal trial, tax trial.

The Court: Did you have anything to do with the preparation of it or work out the final report which was the basis of this determination here?

The Witness: Yes, to the extent that I started the investigation originally.

The Court: Is this a part of it or is it something else?

The Witness: This is not a part of it. This is [401] entirely a separate matter.

The Court: All right, that satisfies me. I don't want the record burdened with it, Mr. Crittenden.

Mr. Crittenden: Your Honor, unless we present the matter that way, then I am going to ask him about it. In the form of brief, I wouldn't hesitate. I will say this, as to his total of expenditures, they are just approximately the columns I ran on in preparation for the first trial, so I can say that his figures that he has here on expenditures and the ones I will submit to you in a brief will be just about the same.

The Court: Did you examine him on this in the first trial?

Mr. Crittenden: No, I just took generalities.

Mr. Marcussen: I think that is not correct. This witness was cross examined in the first criminal trial.

The Court: In criminal proceeding where the

(Testimony of Clarence L. Krause.)

burden is the other way and there has to be proof beyond a reasonable doubt, they sort of spot here and there to show up for the benefit of a jury an error. Here, even though it is small, an error here and there is somewhat different from a showing of the correctness of a determination or the incorrectness of a determination in a civil proceeding such as this.

Mr. Marcussen: That is exactly what was done to the jury in the criminal case. [402]

* * * * *

The Court: Mr. Marcussen, as Counsel for the Government and having made your objection, what is that?

Mr. Marcussen: The page——

The Court: And for the purposes of the record I think I will have you make your statement with reference to what it is and give your basis for your objection and why you are objecting to its being utilized in the record.

Mr. Marcussen: Very well, your Honor. As I understand it, this is a statement of the disbursements made by the taxpayer for the year 1942 and this statement contains a listing of the checks written by the taxpayer for the year 1942 and it also contains a statement of disbursements made by the taxpayer in the form of cash as distinguished from checks and then it contains certain columns. It is a work [407] sheet containing numerous columns extended to the right in which they are set forth here, the columns are headed "wages and bar

(Testimony of Clarence L. Krause.)

taxes, bar expenses, supplies" and then over at the extreme right "personal and miscellaneous" and sub-headings under each one of those, explanation and amount.

Now, Respondent objects to the introduction in evidence or to the use of these documents in this trial for the reason that they represent working papers of Mr. Krause who made an independent audit wholly and completely disconnected from the determination of deficiency in this case. His audit is based—was made, rather, and his distribution of allowable expenses was made for the purpose of presenting a computation of unrecorded income in the second criminal trial. He did not, as I understand it, in the presentation of this audit make the usual Bureau of Internal Revenue audit in which items which were not substantiated as deductions were disallowed. All items concerning which there was any issue at all, all determinations with respect to them were resolved in favor of the taxpayer for the purpose of simplifying the issues, the issue that was presented to the jury in the criminal case in this matter. It is not at all connected with the deficiency case here. It is an entirely separate audit and has nothing to do with the issue here.

The Court: Now, normally in a criminal trial there has to be definite charges to definite items and figures and [408] if the counts in the indictment are not definite and clear, why, then it would be subject to being quashed and thrown out as faulty.

(Testimony of Clarence L. Krause.)

Now, do I understand this then: That for the purposes of this tabulation that what you are saying is that where there was any basis without—I mean clean-cut basis from the showing on the books, without the exercise of judgment, on the basis of unsubstantiated amounts, that only those that were without any need or necessity for that were classified there?

Mr. Marcussen: As disallowed expense.

The Court: As disallowed expense?

Mr. Marcussen: That is right.

The Court: Were those vague and indefinite items in there?

Mr. Marcussen: That is correct.

The Court: Where they would be open to question and open to proof?

Mr. Marcussen: That is correct.

The Court: One way or the other they were, as a general proposition, passed over and allowed to stand as if they were deductions whether they were or not?

Mr. Marcussen: Exactly. All doubtful items for the purposes of the Court——

The Court: Now, just wait a minute until I get through. Now, Mr. Krause, you made up that statement. You [409] made up that tabulation there. You have heard the discussion. It has been over extensive and a lot of repetition here on my part, on Counsel's part and you have heard that statement. Now, you made it up. Do you know the purpose for what it was used? Is that later statement

(Testimony of Clarence L. Krause.)

correct as to what you allowed as expense and what you disallowed for the purposes of that tabulation?

The Witness: Yes, it is, your Honor; the statement is entirely correct.

The Court: In other words, if there was any apparent question where it might have been expense or it might not have been expense, am I to understand that you for the purposes of that audit waived any question and merely entered it as an expense of the business?

The Witness: I leaned over backwards and allowed anything where there was any question about it to the taxpayer, in the taxpayer's favor.

The Court: For instance, what was done with something on the books like an item of entertainment for \$20.00? What was done with that?

The Witness: I would allow it to the taxpayer.

The Court: You would allow it without regard to anything further in the way of a showing as to whether or not it was a personal entertainment or whether business entertainment? [410]

The Witness: Yes, your Honor, I would allow it.

The Court: And that is the way that audit was set up?

The Witness: That is the way it was set up.

The Court: You didn't probe into whether it was personal or business?

The Witness: I did not.

The Court: But you took it from the books where it showed entertainment and you entered it

(Testimony of Clarence L. Krause.)

as a deduction on the theory that it might or might not be business, but you entered it as business?

The Witness: If there was any possible doubt as to where it might be allowable, I would allow just so there would be no question about it in the criminal trial.

The Court: All right, that confirms my judgment. The objection is sustained. [411]

* * * * *

The Court: All right, anything further from the Petitioner?

Mr. Crittenden: No, I don't believe there is any use of going any further.

The Court: Well, of course, if you have some evidence to offer, Mr. Crittenden.

Mr. Crittenden: I understand it is all in there, the basic data and if I brought anybody else in, it would be just a recapitulation of that.

The Court: You would have to be the judge of whether you have any other evidence or not there, Mr. Crittenden; I don't know. All I have done here is to rule that some of the things that you have offered are not competent evidence. Now, I don't know whether there is any evidence or not. You would know better than I would. All I am saying is that if you have [429] anything further to offer, why, I am here to hear it. If not, we will close the case. [430]

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[Endorsed]: T.C.U.S. Filed January 3, 1951.

JOINT EXHIBIT No. 8-A

TRANSCRIPT IN CASE No. 30,929-R

* * * * *

PAUL J. TORMEY

Cross Examination—(Resumed)

By Mr. Crittenden:

Q. And that was the second conference, was it?

A. I was present at the conference of December 7 and and the conference of December 29.

Q. That was one of the first cases you worked on when you came with the Intelligence Unit?

A. It was the first case I worked on.

Q. When the other agent left you took this over; this was the first case you worked on by yourself, wasn't it?

A. That is correct.

Q. You had occasion to see the defendant a number of times in addition to those conferences?

A. That is right, although I don't believe I saw her between December 7th and December 29th. It was not until the spring, perhaps later in 1946, that I had any occasion to see her other than at the conference.

Q. You saw her in the spring, did you?

A. As far as I know, yes.

Q. Again in the fall of 1946, did you have occasion to go out to her place of business?

A. I did go out, yes.

Q. You went in the bar and bought some drinks, did you?

A. I recall that I did.

Q. And she gave you some free drinks?

A. She may have.

Q. And that was on Saturday night?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul J. Tormey.)

A. I don't recall what the occasion was.

Q. Do you remember the incident you went in and asked the waitress to bring the defendant over to the booth where you were sitting?

A. Yes.

Q. How many times have you been in there and drunk at the bar? A. Pardon?

Q. How many times have you had drinks at that bar in 1946?

A. Oh, possibly two or three times.

Q. Do you remember the time you went and asked the waitress to bring the defendant over one of the evenings you went in there?

A. No, I have no recollection of talking to anybody except the taxpayer and her sister.

Q. Do you remember the time you talked to her when she came over to the booth and you were in and you suggested that she could run to Mexico and she said that she had not done anything wrong?

A. I had no such conversation with the defendant.

Q. What did you discuss when you went in all these times?

A. I didn't discuss anything with her except to tell her—in response to repeated questions as to what was happening on her case, that it was completely out of my hands, that I had nothing to do but to find the facts, write the report, and any further action was no connection of mine, that I couldn't influence it one way or the other.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul J. Tormey.)

Q. Do you remember about 12:00 o'clock one night when the bar closed and you were still closed?

A. No.

Q. Do you remember any night that you were there very late? A. No.

Q. I will ask you if you did not say to her about closing time at the bar, as you were leaving, "You will thank me from the bottom of your heart for the recommendation I sent to Washington." Do you remember making a statement to that effect?

A. I made no such statement.

Q. Do you remember another time you came in there and had some drinks with her husband, Mr. O'Connor, and she came in later and talked at the bar?

A. I never had a drink with Mr. O'Connor.

Q. Do you remember the time they asked if they could drive you home and they drove you over to your apartment? A. That is correct.

Q. Do you remember that? A. Yes, sir.

Q. You went up and you, the defendant and Mr. O'Connor, her then husband, had a couple of drinks together and she had some Coca Cola? [280]

A. I beg your pardon. Mr. O'Connor refused to take a drink. Said he wasn't drinking.

Q. You brought out some of the pictures while you were an officer in the war?

A. That is correct. Mrs. O'Connor played the piano.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul J. Tormey.)

Q. Do you remember another time you came out to the place with a blonde girl?

A. The only time that I took anybody out there was in reference to securing an apartment for a friend of a friend of mine, and I didn't talk to the taxpayer. I talked to her sister. The sister very kindly showed this party the apartment upstairs. That is the purpose of the visit, and the visit lasted 15 or 20 minutes.

Q. Yes, and that this nice looking blonde was interested in renting the apartment, wasn't she?

A. Yes, very much.

Q. And they quoted \$75 a month rent and you thought that was too much, didn't you?

A. I don't recall any subject matter except I know my friend couldn't take the apartment because the defendant wanted to sell the furniture and she had no resources to pay for it. [281]

* * * * *

Recross Examination

Mr. Crittenden: Q. Mr. Tormey, since yesterday, is your memory any better as to the name and address of this girl that you testified about?

Mr. Campbell: Objected to as an incompetent question. The matter is entirely immaterial and collateral to the issues here.

The Court: Is your memory better what?

Mr. Crittenden: He said he could not remember her name and address and I want to find her identity to subpoena her here as a witness.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Paul J. Tormey.)

The Court: Read the question, Mr. Reporter.

(Question read.)

The Court: What girl?

Mr. Crittenden: If he has refreshed his recollection since then.

The Court: In relation to what girl?

Mr. Crittenden: The girl he testified about yesterday, and [300] we would like to subpoena her here as a witness. There was a girl he brought up to the defendant's place of business in reference to renting an apartment.

The Court: Q. Do you know anything about her address? A. No, sir, I never did know it.

* * * * * [301]

MRS. ALBERTO BEALL

a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Q. Will you state your name?

A. Mrs. Alberto Beall. [366]

* * * * *

Direct Examination

The Court: Q. Where do you live?

A. I live at 571 Buena Vista.

Mr. Crittenden: Q. Will you please speak louder, so we can all hear you? What is your occupation?

A. Cocktail waitress.

Q. Have you worked for the defendant, Mrs. O'Connor?

A. I have worked there about fifteen months.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Mrs. Alberto Beall.)

Q. Referring to 1946, did you work there part of that time? A. Yes, sir.

Q. Have you ever seen this man over here? I am pointing to Mr. Tormey?

A. Yes, I have. I have waited on him.

Q. Will you tell us where that was and when?

A. Well, I can't set the month, but it was between February and March, I don't know just the dates. I waited on him in Kay's Night Club. He sat in the second booth. He came in and [367] asked for——

Q. What day of the week was it?

A. It was a Friday, Saturday, or Sunday, because I only worked the three days a week, so I don't know what day it was on.

Q. Approximately what time of the day or night was it?

A. Well, I go to work at eight o'clock, and I imagine it was between 9:30 and 10.

Q. What were the circumstances under which you saw him there? What was he doing? Where was he?

A. He went in the second booth and asked if I would call Kay, asked for a drink, first, and asked if I would have Kay come back to the table. I went over to Rose, Kay's sister, the cashier, at the register, and asked her to tell Kay there was a gentleman who wanted to see her.

Q. Did you see the defendant, Mrs. O'Connor,

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Mrs. Alberto Beall.)

and Mr. Tormey sitting in the same booth at any time during that evening?

A. Yes, they sat there all evening.

Q. Did you have occasion to serve them drinks?

A. Yes, I did. I served them drinks.

Q. Who bought the drinks?

A. Well, he bought some of them and she bought some. I never kept count who bought more drinks than the other, because I was busy and never keep count of the drinks, which I don't know.

Q. How late at night did you see him there?

A. He was still there when I went home. That was 12 o'clock, [368] a little bit after twelve, because I turned the lights off at five minutes after twelve, and the three were at the door, Kay, Rose, and myself and the gentleman.

Q. When you left——

A. I left them there. I don't know what happened, or what time he left there.

Q. During the time that you were waiting on them was there anything that drew your attention to them?

A. Well, when I was waiting on the couple in the back booth, right back of them—there is a little steps about like this—I heard Kay, I heard him say, "Well, you can go to Mexico." I was standing there, you know. And she said, she shouted, "Why?"

Well, then, he said, "The Government could bring you back." And I don't know from there on what was said, and she was crying.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Mrs. Alberto Beall.)

Mr. Campbell: May I have that answer read?

The Witness: He said the Government would bring you back.

(Answer read.)

Mr. Crittenden: Q. Was there anything that was said? Was it in a low tone, a loud tone—how clear was it?

A. Well, naturally, they were—maybe they thought they were talking low, but they were not, because the music was on, and you have to talk very loud for people to hear you.

Q. Was there anything else that was said that you heard during [369] the evening?

A. No, I didn't hear anything else. I went on waiting on people. Kay was crying and I went over to Rose and said—

Q. We don't want what you said to Rose. Anything that you said or heard said in your presence with Mr. Tormey. That is all.

Cross Examination

Mr. Campbell: Q. Mrs. Beall, you are still employed by the defendant? A. Yes, sir.

Q. In her place on Valencia Street?

A. Yes, sir.

Q. And you have been employed, I believe you said, fifteen months?

A. Around fifteen months is right.

Q. When did you first go to work for her?

A. It was about 1936—1946, I mean.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Mrs. Alberto Beall.)

Q. When in 1946?

A. Just before Christmas.

Q. That would be November or December, 1946?

A. December.

Q. That was the first time you worked for her?

A. That is right, but I had known her for years.

Q. Yes, but you never worked for her before December, 1946? A. No, I have not.

Q. And you are positive as to that?

A. That is right. [370]

Q. Just as positive as you are of your other testimony? A. That is right.

Q. You claim you heard Mr. Tormey say to her, "You could go to Mexico," is that correct?

A. That is right.

Q. And he shouted it, I take it, in order for you to hear it over the juke box?

A. Oh, no, there was music. She had entertainment, and I was standing just like this, that is, between them. I am in this booth, and she is in this booth. I am right there against them. I couldn't help hearing it. Even if he said it low you could hear it if you were standing where I was. I was waiting on the next table in the next booth, right next to them.

Q. I understood you to say the conversation was quite loud in order that you could hear it over the music.

A. No, I said the music was going and naturally

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Mrs. Alberto Beall.)

maybe they thought they weren't loud, but I heard that. Had to talk loud to hear it.

Q. Then they were talking loud?

A. That is right.

Q. Loud enough so their voices carried beyond their immediate presence to you who were standing behind them waiting on another booth, is that right?

A. The booth seats are like this, and I am right here, right against them almost. You couldn't help but hear them. [371]

Q. You are positive you heard that?

A. I heard that while I was standing that way.

Q. You say that happened in February or March, 1946?

A. That is right. I don't know what date, though.

Q. But you just testified you did not go to work there until December, 1946 and you were very positive of it?

A. It was 1945 I went to work there.

Q. Oh, it was 1945 now. You were as positive of that as you were of the rest of your testimony?

A. Well, I made a mistake in the year, that is all.

Q. When did you first discuss this conversation you overheard with Mrs. O'Connor?

A. I wouldn't have paid any attention to it if she had not been crying.

Q. When did you first talk to her about this conversation you overheard?

A. I haven't talked to her about it.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Mrs. Alberto Beall.)

Q. You never talked to her about it?

A. I just went to Rose and asked her who that gentleman was who was making Kay cry, my sister.

Q. From the time you overheard it until the present time you never talked to Mrs. O'Connor about hearing that conversation? Let the record show the witness shook her head.

A. I did not.

Q. You did not. When did you first talk to her attorneys [372] concerning that conversation?

A. I never talked to her attorneys at all, except right here in the hall today. I have never seen her attorneys. I don't know her attorneys. I never met her attorneys until right out there.

Q. So prior to your taking the stand you never talked to anyone about this conversation?

A. No, I have not. I don't even know her attorneys. I never met them until right out there in the hall.

Mr. Campbell: That is all. [372-A]

* * * * *

ROSE MARIE MATTICK

called by the defendant, sworn.

The Clerk: Will you state your name to the Court and jury?

A. Rose Marie Mattick, M-a-t-t-i-c-k.

Direct Examination ([373])

* * * * *

Mr. Crittenden: Q. Now, I point to this gentle-

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

man over here, Mr. Tormey. Have you ever seen him at the place of business before?

A. Yes, I seen Mr. Tormey several different times.

Q. Referring to any evening, can you give me the approximate date when you have seen him down there at the place of business?

A. Yes, it was in the early part of the year, in March, I think, in February or March.

Q. What year? A. In about 1946.

Q. Where was he in the place of business?

A. Well, he just come in and Miss Beale come up, my back—I am at the register and my back is to the front, and she comes up to me and asks where Kay was. I said she is back here talking, she was at the end of the bar talking to some gentleman. I said, "Why?" She said, "There is a gentleman up here to see her." I said, "O.K., she is down here," so Miss Beale goes back to Kay and she takes her up there and she gave him a booth and talking to Mr. Tormey.

Q. What time did Mr. Tormey spend there talking?

A. Oh, it was after we had closed because he stayed there talking to my sister. He was sitting there talking with Kay all night. [383]

Q. All night? A. All evening.

Q. Until what time?

A. 12:00 o'clock. That was our closing hour then, 12:00 o'clock.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

Q. Were you there when he left?

A. Yes, I was there. I shook hands with him. He told me goodnight with Kay. [384]

* * * * *

Mr. Crittenden: At the time he departed at the bar, what was the conversation?

A. Mr. Tormey was telling us goodnight. He shook hands with my sister and with me. He said, "Kay, don't worry too much about this because I have already given—you are going to thank me some day for making recommendations to Washington. You are going to thank me in your behalf." Now, he said that if I was going to drop dead off this stool, that's exactly what he said.

Q. Did Mrs. Beale come up and report anything to you?

A. Yes. I had my back to the audience——

Mr. Campbell: I object to this, this is something between Mrs. Beale and the witness.

Mr. Crittenden: Q. Did you talk to Mrs. Beale about this matter and bring her up here to talk to me? [384]

A. Oh, no. I never talked to nobody.

Q. I said did you speak to Mrs. Beale and bring her up here to talk to me today?

A. Oh, certainly, to bring her up, certainly I did.

Q. You contacted her last night at my request?

A. Yes, I called her.

Q. You heard Mr. Shannon testify, the bartender?

A. Yes, I did.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Rose Marie Mattick.)

Q. Did you have occasion to talk to him in the last month or so before this trial?

A. Not a month or so. That was before he was called as a witness, I was going up the corner to eat.

Q. Where was that?

A. On Valencia Street, going up to eat at the restaurant. We are at 581, 579 Valencia, and this was, I was going up to the Dairy Lunch to the corner, it happened right on the street, in the middle of the block.

Q. Did he say anything to you about this case?

A. Yes.

Q. And his testimony? A. Yes.

Q. What did he say?

Mr. Campbell: I object to that as immaterial and incompetent and hearsay. [385]

* * * * *

Cross Examination [401] * * * * *

Mr. Campbell: Q. I believe you stated that you talked to Mrs. Beall, who preceded you on the witness stand.

A. Miss Beall.

Q. Miss Beall, yes.

A. Oh, I just called up to tell her to come down here to appear [408] here at court. Is that what you want me to say?

A. No, I don't want you to say anything that is not the truth.

A. Well, I am telling the truth.

Q. I am asking you if you called her up last night and asked her to come down here?

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

A. Yes.

Q. And help your sister—or to appear as a witness. That “help your sister” may go out.

A. That’s right, yes.

Q. When did you talk to Miss Beall, at any time prior to last night as to what her testimony would be?

A. No.

Q. You never had?

A. I never talked to Miss Beall about testimony or anything.

Q. Did Miss Beall ever tell you about the conversation she had overheard?

A. You mean with Mr. Tormey?

Q. Yes.

A. The night that it happened she came up, Kay was crying——

Q. Did she tell you about it that night?

A. She came and asked me who was the man. I said, “Who?” And I turned and I said, oh, he was Mr. Tormey. She said, “Well, what is she crying about?”

Q. I asked you if Miss Beall at any time prior to last night related anything to you about overhearing Mr. Tormey say, [409-10] “You can go to Mexico”?

A. Yes, she told me that before.

Q. She told you that before?

A. Yes, she told me that before, but I didn’t pay no attention to it, because, after all, you know,

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

she just came up and told me, she said she heard a conversation, and Kay was crying. She said Kay said, "Why should I go to Mexico, I haven't done anything."

Q. When did she tell you that?

A. She told me that right after it happened; maybe a day or so after it happened.

Q. Did you report that back to Mrs. O'Connor?

A. Yes, sure, I did, and that wasn't it, I heard Mr. Tormey say——

Q. No, no, please, Mrs. Mattick; just answer my questions.

A. I am sorry I can't answer. [411]

* * * *

Redirect Examination

Mr. Crittenden: Q. Will you testify as to what happened that afternoon, and who was present?

A. I was upstairs alone in the apartment, I was cleaning the apartment, putting up new——

The Court: When was this?

A. It was in February sometime, your Honor; I could not say the date.

The Court: What year?

A. It was in 1946. [418]

The Court: What month?

A. It was after the 15th of February, because the people's rent was up then. They had moved and I was cleaning up the apartment. It was between the middle of February and the 1st of March.

The Court: Q. Who was present?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Rose Marie Mattick.)

A. Just me. I was up there, and I was just cleaning the apartment, and my sister has a loud speaker from the tavern upstairs. She called me and says Mr. Tormey is coming up to look at the apartment with his lady friend. I said, "All right." So they came on up. Then Kay comes up, too.

Mr. Crittenden: Q. What was said in the presence of all four of the people at that particular time? Can you state who said what, and the approximate order in which it was said?

A. Well, I showed the apartment to the little lady that was with Mr. Tormey that was looking for the apartment, and she wanted something more secluded; what I mean by that is, the living and bedroom is together, and she wanted the privacy of a bedroom. She said that was the reason she did not want that apartment, but she wanted an extra bedroom in there.

Q. Was there anything Mr. Tormey said?

A. I can't remember that.

Q. Was there any discussion of the rent with her?

A. Yes. It was \$65 a month. Yes—I will take that back. Mr. Tormey said he thought that was pretty high, the rent. [419]

Q. Do you remember who this fourth person was that you were talking to, was she introduced?

A. Yes, yes, Mr. Tormey introduced her to me, but I don't remember her name. She was another tenant just looking for an apartment with him.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

Q. What did she look like?

A. She was a very beautiful woman, she was a very beautiful person.

Q. How old?

A. Very nicely dressed, and she was light-complected, and a very nice person, she really was.

Q. About how old was she?

A. Well, I imagine she was in her thirties. I wouldn't know, but just kind of judging.

* * * * *

Recross Examination

Mr. Campbell: Q. Did she tell you her husband was outside in the car waiting for them while she inspected that apartment? A. No.

Q. She did not tell you that? A. No.

Q. Did you look out the window, or did you have occasion to go downstairs at any time while she was there, or at the time she left? [420]

A. No, I didn't go out there. I just went to the steps, and out on the apartment steps, while they were going downstairs, and talking on the way down, and they didn't go out to the car, they went on back down to the tavern.

Q. Didn't Mr. Tormey tell you on that occasion that it was a friend of a friend or a friend of his family who were the persons who needed an apartment? A. He didn't tell me that.

Q. Did he say it was a friend of a friend?

A. No, he didn't tell that to me. He didn't tell me anything about the lady. He just introduced me

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

to the lady. I don't know what he told my sister, but he didn't tell me anything.

Q. You don't know what he told your sister?

A. I don't know anything about that.

Mr. Campbell: That is all. [420-A]

* * * * *

CATHERINE O'CONNOR

resumed the stand, having been previously duly sworn, testified as follows: [483]

* * * * *

Direct Examination

Mr. Crittenden: Q. Did Mr. Tormey come down to your place of business at any time during this investigation? A. Yes, he did. [577]

Q. What were the days?

A. He was down there one afternoon. He was sitting there drinking with Ed O'Connor all afternoon.

Q. Let us have the time, place and persons present. A. It was in the fall of 1945.

Q. Was it before or after the first time that you made a statement in the Intelligence Unit's office?

A. It was afterwards because otherwise I wouldn't have known Mr. Tormey.

Q. Was it after the last conference down there about which testimony has been given or was it before or during the last time?

A. I can't remember exactly. I think it was in between.

Q. Who was present at that time?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Catherine O'Connor.)

A. Well, there were the regular customers present and my husband, Ed O'Connor—I was married to him at the time—he was there and my sister is always there and myself and my bartender.

Q. What was said?

A. I don't know what was said. I was busy myself. Mr. Tormey and Mr. O'Connor were talking, and when Mr. Tormey got ready to go home, we offered to take him home in our car, and we did.

Q. Where did you go?

A. He invited us up to his apartment and he served us a drink, and he was very pleasant. I played the piano in his apartment. He had taken pictures, and his various trophies or whatever it [578] was he got in the war he showed us. And we had a very pleasant time while we were there. I think we were there about an hour with him.

Q. Anything else said or done?

A. Not at his place, no. Just that. He was alone. He said his wife wasn't there.

Q. Referring to the next time you saw him, where did you see him then?

A. And then Mr. Tormey came in one night.

Q. What was the approximate date of that?

A. And how I am trying to determine when Mr. Tormey came in was this way: I had some people up in the apartment, in the back apartment.

The Court: Fix the time.

The Witness: Yes, Judge. I was trying to. I

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Catherine O'Connor.)

think it was in the spring. It was in the latter part of February or the first part of March of 1946.

Mr. Crittenden: Q. What time of day was it?

A. And he came in—It was at night, and it was after the entertainment had started. My entertainment starts at 9:00 o'clock.

Q. Who was present when you talked to him?

A. I was sitting at the bar talking to a salesman at the time when he came in. I didn't even see him come in, and I was down at the end of the bar, and my little waitness came down and [579] either she——

Mr. Campbell: I am going to object to the conversation other than the conversation to which attention was originally directed.

Mr. Crittenden: Q. When you first had your attention drawn to him, where were you?

A. I was at the bar and I was notified—I will put it that way—that Mr. Tormey wanted to talk to me.

Q. Then what did you do?

A. And then I went up in the booth with him.

Q. What happened up there? What was said?

A. He was sitting there. He had a Scotch and soda. He was drinking. We got to talking. He was drinking. He had been drinking before he came in.

Mr. Campbell: I ask that be stricken out as a conclusion of the witness.

The Court: Let it go out. Let the jury disregard it.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Catherine O'Connor.)

Mr. Crittenden: Q. What, if anything, was said?

A. The reason I say that about it was because——

The Court: The question is, state what was said at that time and place between you and Tormey.

The Witness: Judge, I was going to tell him he just mumbled.

The Court: Tell the jury the conversation.

The Witness: He was mumbling about this trial to me. I [580] couldn't get head or tails what he was mumbling. He was telling me, well, about these penalties of not turning in a proper income tax report and this and that about it. He was talking in general about me being in this trouble. And he said, "Of course, you could go to Mexico."

And I said—and that is when I called out and said—but he said, "We will bring you back." He knows he said it, too.

Mr. Campbell: I ask that the last be stricken.

Mr. Crittenden: Q. Just give the conversation and what took place.

A. That is what I have said, and I called out and said, "I have no reason to go to Mexico because I have done nothing wilful."

* * * * *

Mr. Crittenden: Q. How long did he stay there?

A. He stayed there until 12:00 o'clock, until the place was closed. [581]

Q. Then what happened?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Catherine O'Connor.)

A. He was the last to go. There was no one left there but my sister and myself and this girl, Alberta, who works there, and she left, and Mr. Tormey was still at the door with us. So we shook hands and I was feeling badly, of course.

Q. Did he make any statement to you?

A. He said there would be a day I would thank him for his recommendation to Washington.

Q. Is that when he left after that?

A. And while he was there he asked me about an apartment.

The Court: Proceed, counsel.

Mr. Crittenden: Q. Can you tell me what was said about an apartment?

A. Yes, he asked me if I had an apartment and I told him it just happened that I had an apartment to rent. These people just got out of there. So he had a friend who was looking for an apartment.

Q. When did he bring anybody around to look at the apartment?

A. He told me he would call up and find out about more definite, and I said, "All right," and so he called——

Q. When was that?

A. He called three or four days later.

Q. Did he make an appointment?

A. He said he was bringing up a friend, and he did. He brought up a young lady, a very nice young lady. [582]

Q. Did you show her the apartment?

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Catherine O'Connor.)

A. No, I did not. I was on the bar.

Q. Did you go upstairs during all the time it was being shown?

A. Yes, I ran upstairs for a few minutes. My sister was up there cleaning. I called up and told her Mr. Tormey was coming up. And then I went up there and I talked prices with him. I talked rentals. And he said he thought the amount was too high for the place.

Q. How much did you quote for it?

A. I think I asked him \$65 or \$75, I am not sure, but it was just the amount I had been getting for the apartment when the people left, the amount that I am allowed.

Q. Was anything said about any of the facilities as to whether it was acceptable or not?

A. And the little lady said she wanted more privacy. The glass doors in the bedroom, the doors in the bedroom coming into the livingroom were glass, and she wanted more privacy.

Q. When they left the apartment, did you go with Mr. Tormey and this girl?

A. No, I did not. I ran downstairs.

Q. Did you see them leave?

A. Because I was alone on the bar. And they came in—I think, yes, I am sure they did. They came in afterwards. Now, whether they had a drink or not I don't know. But they came up in a Yellow Cab. The reason I know they came up in a Yellow Cab was [583] because they were standing at the

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Catherine O'Connor.)

—I was standing in front of the bar when they drove up.

Q. Did you see them leave?

A. I seen the Yellow Cab drive right up to the front of the door, and I didn't see Mr. Tormey and this girl get out of the cab, but the cab stopped in front of my door and the next thing I seen Mr. Tormey and this young lady were coming through the door.

Q. Did you see them leave?

A. Yes, I saw them leave, but I didn't see them get in a car or a cab. I saw them walk out the door, turn, and go down 16th Street. [584]

* * * * *

PAUL W. TORMEY

called in rebuttal, previously sworn.

Direct Examination

Mr. Campbell: Q. You have previously been sworn in this case? A. Yes.

Q. Mr. Tormey, did you at any time during the course of this investigation or afterward ever have any conversation with this defendant wherein you stated in words or in effect that she could "go to Mexico, we can bring you back."? A. No.

Q. Or that you can't bring her back?

A. No.

Q. Did you ever state to her at any time during the course of the investigation or after that she could go anywhere?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul W. Tormey.)

A. Not that I recall, sir.

Q. While not material to the case, there has been made certain statements here relative to your trip to the apartment or apartments of the defendant with a person characterized as a beautiful blonde for the purpose of renting an apartment. For the purpose of the record, I want you to state the circumstances [655] exactly as they occurred.

A. Yes. First of all, there has been considerable confusion as to the date.

Q. No. Just state when it occurred and what occurred and the circumstances under which you went there.

A. It was subsequent to July 1946. It may have been in the late fall of 1946 or early spring of 1947, January or February 1947. I don't recall whether this girl was a beautiful blonde or not. I would like to, but I don't remember. She was introduced to me by a friend of mine whose name I can divulge if necessary, and as a favor to my friend, I took this young lady and her husband in my own car, not a taxi, out to this tavern.

Q. How did you happen to go to the defendant's place?

A. Because I had been talking to the defendant, knew she had these apartments and thought one might be available to rent. In fact, I think I verified it on the telephone before I went down there. I believe it was testified to that effect, and I arranged the meeting and we came down to talk to

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Paul W. Tormey.)

her in the bar for a short time and went upstairs. I had no concern with whether the apartment was rented or not except the rent seemed high to me and I said to my friend when the taxpayer's sister, Mrs. Mattick, as she testified, said the furniture would have to be purchased along with the apartment, I advised my friend, "Well, don't bother about it, I didn't know anything that the [656] furniture had to be purchased here." I went home and told my wife about it, thinking whether she would be responsible or not to report the matter for demanding to purchase the furniture, that was considered unethical then.

Q. Was anything said at that time, at the time the parties were having the interview, about privacy of the bedroom?

A. Not that I recall. I did not pay any attention to it. As a matter of fact, I was in the other room when Mrs. Mattick and the young lady were all around there.

Q. Did the young lady's husband go upstairs with you?

A. No. He had an appointment downtown. I believe he came in to the bar with us, then left, or he stayed in the bar and left immediately after.

Q. How did you, her husband and yourself arrive there on that occasion?

A. In my own personal car.

Q. Had you ever seen either her or her husband prior to that day?

A. No.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Paul W. Tormey.)

Q. Have you ever seen them subsequently to that date? A. No.

Q. You were simply doing a favor for a friend?

A. That is correct.

Q. Was that at his request?

A. That is correct. [657]

* * * * *

Cross Examination [662]

* * * * *

Mr. Crittenden: Q. Mr. Tormey, at the time you went to the bar of an evening, do you remember whether that was a weekend?

A. It probably was on a Friday or Saturday night. That was the only time I ever recall being there.

Q. That was when she told you she expected a vacancy in the apartment?

A. I don't recall she told me that. In fact, I think the apartment deal had happened several months before the incident that you mention, so I—To answer your question, I can't recall that that was discussed at that meeting.

Q. The apartment deal, do you remember the day of the week that was?

A. No, I have no idea.

Q. It was a weekday?

A. I have no idea.

Q. Do you remember the time of day it was?

A. Yes; about 4:00 o'clock in the afternoon.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul W. Tormey.)

Q. You were employed full time in the Intelligence Unit?

A. Yes. I happened to be on leave that day, though.

Q. Then you could give us the exact date. You know the days you are on leave. [664]

A. No; that has nothing—

Q. You must know when you take a leave.

A. I am not testifying as to my leave.

Q. Do you keep records of when you take leaves? A. That is correct.

Q. Could you tell me from that the day you were there at the apartment?

A. No, not from that.

Q. You showed a lot of concern about the rent for that apartment, didn't you?

A. Not that I recall. It seemed high to me.

Q. \$65 to \$75 a month?

A. I don't recall.

Q. You didn't tell the woman to go to the OPA, did you?

A. No. This is an entirely different apartment. This building is not the same building. The taxpayer had moved in 1945, she testified, so I had no notice of any of her concerns in this new place.

Q. Did you leave the husband sitting in your car downstairs?

A. I have testified to that. As far as I recall he was either in the car or waiting downstairs in the bar for us.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul W. Tormey.)

Q. Did he intend to live in the apartment?

A. I know nothing of their personal plans. I had never met the couple before and have never seen them since.

Q. Did he give any reason why he did not want to come up and look at the apartment?

A. It was of no concern of mine.

Q. When you left you went downstairs to the bar, didn't you?

A. Not that I recall. We may have, but not for a long time. It couldn't have been very long, because the young man who was with us had an appointment downtown. As I recall, we drove him up to Market Street. He got out and took a taxi from there.

Q. In reference to this place, where did you park? Right in front of it?

A. I don't recall, probably not, because it is almost impossible to park on Valencia Street at four o'clock in the afternoon.

Q. Do you have any recollection at all of where you parked the car?

A. No, I have not. It was close by, across the street, probably.

Q. As soon as you left there you came down and he took a taxicab from Market Street, is that right?

A. That is the way I recollect it, yes.

Q. You did not take a taxi out there? [666]

A. No, sir.

Q. Did you go through the apartment, yourself?

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Paul W. Tormey.)

A. I went up—as I recall it was upstairs—went into kind of a big hall, and there appeared to be a living room, and then open glass doors, and a place with a bed in it, so you could see the whole apartment once you were in it.

Q. Then you did hear what the parties were talking about?

A. Very probably I did, but I don't pay attention to a couple of women discussing apartment houses.

Q. Now, the night that you say you were there, was it 9 to 12 that you were at the bar?

A. I have not said how long I was there.

Q. How long were you there?

A. I don't know. It was not a matter of importance to me how long I was there.

Q. Do you have any recollection of how long you were there?

A. Why, I presume I may have been there two hours.

Q. Do you remember closing time?

A. No. I question I was there closing time, but I know I was anxious to get away, because the taxpayer was crying and asking me what was going to happen in this case. The report on the case had been written, signed, and sent in months ago, so consequently out of my mind, and I wanted to get away from there, and so far as I was concerned I had no desire to stay there. [667]

Q. Why did you go to the bar?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul W. Tormey.)

A. Because we were still interested in this taxpayer. He had bought this new bar out of funds, and we had not made up our minds whether we were going to investigate any further. Part of our work is investigation of that sort.

Q. Is it your testimony you had sent a report in and had finished your investigation?

A. That is right, for the years under review. That does not end the matter.

Q. You were going over to see if you were going to make a further investigation of that?

A. No, I was interested, I said, to find out what I could find out.

Q. And also to see if you could have some free drinks?

A. Oh, I do not believe so. I think the defendant will testify if I accepted one or two free drinks from her that would be the extent of it, and I always had to refuse them, and out of politeness I finally did. I did not have to accept free drinks.

Mr. Crittenden: That is all.

* * * * *

Redirect Examination

Mr. Campbell: Q. When was your report in this case completed, Mr. Tormey?

A. May of 1946. [668]

Q. And you are positive that these two occasions which you have been questioned about were after that date? A. Yes, sir.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul W. Tormey.)

Mr. Campbell: That is all. [669]

* * * * *

[Endorsed]: Filed November 13, 1950.

PETITIONER'S EXHIBIT No. 1

Technical Staff, 4 April 1950
Bureau of Internal Revenue, Treasury Dept.
508 Sharon Bldg., San Francisco 5, Calif.

Re: Catherine O'Connor vs. Comm'r. U. S. Tax
Court No. 24206.

Dear Sirs:

Yesterday, when I telephoned Mr. Sorrell of your office to discuss possible compromise of the above litigation, I learned that Mrs. O'Connor had been enticed into a conference without my knowledge or consent. I then telephoned Mrs. O'Connor and learned of the details, and was assured that I had been her attorney, and was still her attorney and she wanted me to continue representing her. I also telephoned a McLaughlin who was present and who told me about what had transpired.

I have attended a couple of conferences with the Technical Staff and General Counsel's office looking toward a possible compromise of the above litigation, and on March 9, 1950 I had written the Technical staff a letter outlining a basis for possible settlement.

Now, I learn that some day last week, a certain McLaughlin contacted your office and made an appointment to bring in Mrs. O'Connor, my client. By letter dated March 30, 1950 (evidently after this request for a conference) my suggestions as to a possible basis of a compromise were rejected by a letter which arrived yesterday afternoon. I immediately called Mr. Sorrell to see if there were some basis that the government could suggest for a compromise, and then I learned Mrs. O'Connor had spent the morning in your office discussing the pending litigation; and when I asked what was said, I was told I would have to ask my client; and when asked who were present, I was told Mr. Marcusson (of the General Counsel's office to whom this litigation was assigned to defend the Commissioner), Mr. Tormey (Special Agent, Intelligence Unit who was the principal investigator who instituted and prepared the original report recommending criminal prosecution of my client), Mr. Sorrell, and Mr. Lawder.

My client told me by telephone that McLaughlin had suggested the idea, arranged the meeting, and was present. Mr. McLaughlin told me by telephone that he was neither licensed to practice before the Treasury nor before the U. S. Tax Court.

My secretary tells me that no attempt was made by either the Technical Staff nor by the General Counsel's office to advise me of the contemplated conference.

The A. B. A. Canons of Professional Ethics states: "Negotiations with Opposite Party. A

lawyer should in no way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

My client tells me that those of your office and the General Counsel's office who were present undertook to advise her on matters of law in the pending case, burden of proof, presumptions, etc., in that litigation with the Commissioner.

Very frankly, I was horrified to learn of what transpired. I attempt to follow the canons of legal ethics, and I have always believed that the Commissioner expected those under him to abide by the rules of ethics. Certainly, one does not shed his ethics when he undertakes employment in the Bureau of Internal Revenue.

It is indeed shocking when one considers the following:

(1) McLaughlin is not licensed at all to appear and has no right or privilege to appear in any matters before the Treasury Dept. and has no right to practice before the U. S. Tax Court.

(2) No effort was made to notify me of the conference, although I have a telephone and office but a block and a half from the Technical Staff; have appeared in the matter, and appear as the sole attorney of record for the Petitioner Mrs. O'Connor.

(3) There is a lot of bad blood, known to all parties involved, which arose in the District Court trial involving Mrs. O'Connor when I cross-examined Mr. Tormey and he admitted during the investigation he brought a blond girl, not his wife, to Mrs. O'Connor to obtain an apartment for this girl from Mrs. O'Connor.

(4) Mr. Hyman, associate counsel with me in the defense of Mrs. O'Connor before the District Court, believes as I do that McLaughlin was and is working for and with the Intelligence Unit to embroil Mrs. O'Connor and we base this upon McLaughlin's suggestion to Mr. Hyman that we permit him to influence District Judge Roche in chambers while the case was pending before him; and Mr. Hyman specifically warned McLaughlin not to and threatened proper proceedings if he should attempt such a thing.

The cause of Catherine O'Connor vs. Commissioner of Internal Revenue is a controversy, at issue, before a judicial tribunal, the U. S. Tax Court, in which Mrs. O'Connor is a party litigant and I am her counsel and the Commissioner is a party and represented by the Technical Staff and the General Counsel's office. This is not a matter being appealed from the Agent's Office.

May I have an acknowledgment of this letter by return mail, and a prompt reply as to what took place and what the Technical Staff's and General Counsel's office position is on this matter.

I feel very deeply that a grave injustice has re-

sulted from the unfortunate incident that took place yesterday.

Very truly yours,

HOWARD B. CRITTENDEN, JR.

HBC:S

RESPONDENT'S EXHIBIT N

[Petitioner's Exhibit No. 2 admitted for identification Nov. 13, 1950; Respondent's Exhibit N admitted in evidence Nov. 14, 1950.]

[Letterhead of Treasury Department]

CC:A:PD SF:BHN-LAM

April 10, 1950

Mr. Howard B. Crittenden, Jr., Attorney at Law,
Central Tower Bldg., San Francisco 3, Calif.

In re: Catherine O'Connor, Docket No. 24206.

Dear Mr. Crittenden:

This will acknowledge receipt of your letter of April 4, 1950, addressed to the Technical Staff, with which was enclosed a copy of a new power of attorney executed on the same day, authorizing you to represent Mrs. Catherine O'Connor in her case before The Tax Court of the United States. The letter has been referred to me for answer.

Please be advised that on April 3, 1950, Mrs. O'Connor appeared in the office of the Technical Staff accompanied by Mr. Raymond K. McLaughlin and requested that she be permitted to discuss her case with a view to reaching a basis for settlement without litigation.

Mrs. O'Connor stated that she did not want you to

represent her any further in this case and that she was requesting you to withdraw. She then asked that Mr. McLaughlin be allowed to represent her in the conference and executed a power of attorney in the presence of the conferees in favor of Mr. McLaughlin, revoking all other powers of attorney, and expressly giving him "full power of substitution and revocation." In view of the fact that Mr. McLaughlin was not enrolled to practice before the Treasury Department, her request to be represented by him at the conference was denied. At her request, however, he was permitted to remain in the conference room.

Under the circumstances the Staff representative acted properly in declining to discuss with you on the telephone what happened at that conference, when you called later the same day. Moreover, in view of the new power of attorney executed by Mrs. O'Connor in your favor there appears to be no necessity for answering your inquiry as to what occurred at that conference.

It is regretted that you have seen fit to make unfounded charges of impropriety concerning the procedure followed in handling Mrs. O'Connor's case in this office. You are referred to Conference and Practice Requirements, Bureau of Internal Revenue, as revised February 1942, which are published in full in the tax services.

Very truly yours,

/s/ B. H. NEBLETT,
Division Counsel

PETITIONER'S EXHIBIT No. 3

Technical Staff 11 April 1950
Bureau of Internal Revenue, Treasury Dept.
Sharon Bldg., San Francisco, Calif.

In re: Catherine O'Connor vs. Comm'r U. S.
Tax Court No. 24206.

Dear Sirs:

This morning's mail carried the letter of the General Counsel's Office of April 10th in the above matter.

Mrs. O'Connor tells me that when she first appeared at the Technical Staff Office, she stated that I represented her and she wanted me to represent her in the matter before the United States Tax Court; and when asked if I knew about her presence at the office of that agency, she said I did not. This is quite different from the statement of fact contained in the letter of the General Counsel's office of the 10th.

Even if we assume that the statement of fact by the General Counsel's office be correct, still it would not justify the conduct of District Counsel who sat in the conference nor the conduct of the others in the Technical Staff:

(1) The general rule (which includes the Federal Rule) is stated in the Rules of the United States Tax Court, Rule 24b): "Withdrawal of counsel. Counsel of record in any proceeding desiring to withdraw, or any petitioner desiring to withdraw counsel of record, must file a motion with the Court

requesting leave therefor reciting that notice thereof has been given to the client or to the counsel being withdrawn, as the case may be. The Court may, in its discretion, deny such motion."

I remain counsel in a case in which I have appeared by the filing of the Petition, until the Court's order withdraws me, or the relationship of attorney-client is revoked by death, etc., or the termination of the litigation. Adverse counsel and the Court are bound by this rule and must deal with me as counsel until the order of the Court relieves me as counsel.

(2) The Rules of the Bureau of Internal Revenue (Practice & Procedure), Rule IV, Power of attorney not required in certain cases pending before the Tax Court, provides: "In a docketed petition before the Court, it is considered that the petitioner and the Commissioner stand in the position of parties litigant before a quasi judicial body. The Tax Court has its own rules of practice and procedure, and its own rules respecting admission to practice before it. A Staff division in the decentralized areas is authorized to deal with the counsel of record before the Court in a petition docketed by the Court. Therefore, correspondence in connection with Court dockets will, ordinarily, be addressed to counsel of record before the Court; and in any event the position of the Bureau is that such counsel of record shall receive copies of any correspondence, or be advised as to the general nature of any communications, which for good and sufficient reason may be addressed directly to the taxpayer."

(3) U. S. Tax Court Rule 2, provides: “* * * Practitioners before this Court shall carry on their practice in accordance with the letter and spirit of the canons of professional ethics as adopted by the American Bar Association.”

Attention is drawn to American Bar Association Canon of Professional Ethics Number 9, quoted in my letter of April 4, 1950.

On April 5, 1950, I telephoned Mr. Lawder, head of the San Francisco office, and told him that I felt I had been very badly treated and kicked around, and that I wanted an opportunity to sit down and present my side in the matter and suggested that Mr. Marcusson, Mr. Sorrell, and any other person interested should be present. He stated he had read my letter of the 4th, that he was then engaged in a conference but would telephone me as to the time for the requested conference.

The fact that District Counsel and the Technical Staff would accept and file “a power of attorney” from McLaughlin, an unlicensed person, and permit him to remain at the conference shows that the statement that he was denied the right to represent Mrs. O'Connor at the conference is an attempt to shade the word “represent”. The fact remains I was attorney of record in the litigation before the U. S. Tax Court, and must remain such until the Court makes an order relieving me upon proper notice and a motion, and no “power of attorney” to McLaughlin nor revocation could have any legal effect until the Tax Court rules and the rule of law of Federal Court Practice were met.

Mr. Lawder was at neither of the prior conferences that I attended on behalf of Mrs. O'Connor. He was at the conference at issue. If he were a necessary or proper person at the conference, it appears a bit unusual that he would not attend one where the taxpayer is represented by licensed counsel, but would attend when an unlicensed person were present and licensed counsel absent. If he were neither a necessary nor a proper person at the conference attended by licensed counsel, it might raise the inference he was brought into the conference at issue to share responsibility.

I do not know what was said during the two (2) hours my client was in conference in my absence; and my client is not skilled nor does she have knowledge of tax procedure. I am writing you again asking what was said during the conference; and if you have a transcript of it or any part of it, to provide me with a copy of the transcript.

My client obtained the impression from what was said to her during the conference I did not attend, that the officials of the Staff and District Counsel's office did not want to confer with me, and other matters which attacked me professionally. I feel that driving a wedge between attorney and client is not at all the proper subject of a conference, particularly in the absence of the counsel. Furthermore, she appears to have been advised on matters of law during the conference, which I also feel a bit improper. It is most essential that I be advised by letter as to what transpired, to properly represent my client in this matter.

There must have been a lot said about the merits of the cause at issue, on both sides during the conference I did not attend, and it is most essential that I be fully informed of your contention as to any and all admissions or any positions taken by my client in my absence.

For my own part, I feel a great injustice has been done me, and I would like to have this matter a subject of a conference. I am still awaiting Mr. Lawder's advice as to the agreeable time for this meeting.

The Bureau of Internal Revenue Rules of Practice and Procedure entitle me to be advised of any communication made directly to my client. I think I am entitled to this information from your office.

My authorization to represent Mrs. O'Connor exists under and by virtue of my relationship of attorney and client before the United States Tax Court. The instrument I sent you dated the 4th, signed by both my client and myself was a mere statement that the relationship of attorney and client had existed from the inception of the U. S. Tax Court litigation, did still exist, and continued to exist, to dispell any doubt of my authority as counsel that might arise from the very unfortunate incident of Monday, April 3rd, and the unfair advantage taken of my client.

Very truly yours,

HOWARD B. CRITTENDEN, JR.

HBC:S

[Endorsed]: No. 14392. United States Court of Appeals for the Ninth Circuit. Catherine O'Connor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: June 14, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14392

CATHERINE O'CONNOR, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS

The petitioner Catherine O'Connor, herewith states, pursuant to Rule 75(b), the points on which she intends to rely upon the petition for review in the above-entitled matter:

1. That the above-entitled Court failed to make findings of fact upon the issues of the amount of expenses and deductions for each of the years 1942, 1943 and 1944; failed to make findings on the issue and motion for exclusion of evidence obtained by

unlawful methods, and of evidence obtained as leads therefrom; and failed to make findings on the issues that the accounts and deficiencies of the Commissioner were based upon the accounting, work and investigation of Special Agent Tormey, and that he was motivated by improper motives, and the issues of his solicitations of considerations for himself and a blonde girl friend during the investigations he made.

2. That the above-entitled Court erred in failing to exclude participation of counsel for the respondent who obtained information unlawfully, in violation of the Rules of Court, United States Tax Court, and in violation of the American Bar Association Canon, through enticing the petitioner, in the absence of her counsel, and without knowledge or consent by counsel, into a conference represented by an unlicensed person, at which conference the merits of the case were discussed.

3. That the above-entitled Court erred in refusing to permit petitioner upon the trial to prove amounts of expenses and deductions in each of the years involved, by the witness Krause.

4. That the above-entitled Court erred in refusing to permit the petitioner to prove by an accountant the expenses and deductions for each of the years involved, upon the grounds that the primary records thereof were already in evidence, and then found that there was not sufficient evidence by such primary records and testimony to make a finding of the account or amount of expenses and deductions.

5. That the above-entitled Court erred in denying petitioner the right to prove the expenses and deductions of said taxpayer in each of the years involved, to wit, 1942, 1943 and 1944, an issue in the above-entitled action, and thereby denied petitioner due process of law, Fifth Amendment, United States Constitution.

Dated: June 24, 1954.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioner, Catherine
O'Connor

[Endorsed]: Filed June 25, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

Excerpt from proceedings of Monday, November
22, 1954.

Before: Healy, Orr and Pope, Circuit Judges.

ORDER GRANTING MOTION

The motion of respondent for permission to furnish photostatic copies of certain exhibits in lieu of printing exhibits coming on for hearing, there being no one present on behalf of respondent, Ordered motion submitted for respondent on papers filed, and argued by Mr. Howard Crittenden, counsel for petitioner in opposition thereto, and submitted to the court for consideration and decision.

On consideration thereof, Further Ordered said motion granted.

No. 14393

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM ROSS PHILLIPS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
*Assistant United States Attorney,
Chief of Criminal Division;*

MANUEL L. REAL,
Assistant United States Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

FILED

OCT 4 1954

**PAUL P. O'BRIEN
CLERK**

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No. 14393

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM ROSS PHILLIPS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

Statement of Jurisdiction.

Appellant, William Ross Phillips, was indicted by the Federal Grand Jury in and for the Southern District of California on July 15, 1953 together with one Salvatore Anthony Ferraro. The Indictment charged appellant Phillips and Ferraro with violations of Title 18, Section 1005 (False Entry in Record of National Bank) and Title 18, Section 371 (Conspiracy). [Tr. pp. 2-4.]¹

On July 27, 1953 appellant Phillips appeared for arraignment and plea represented by Joseph T. Forno, Esquire, before the Honorable Peirson M. Hall, United

¹"Tr." refers to Transcript of Record.

States District Judge, and entered a plea of not guilty to the offenses charged in the Indictment.

On February 2, 1954 the case was called for trial before the Honorable Ben Harrison, United States District Judge, sitting with a jury, and on February 9, 1954 the jury returned a verdict of guilty as to the appellant Phillips to each count charged in the Indictment. [Tr. p. 6.]

On February 23, 1954 appellant William Ross Phillips was sentenced to imprisonment for a period of five years in a penitentiary on Count One, and a period of five years in a penitentiary on Count Two, both periods of imprisonment to run concurrently.

The district court had jurisdiction of this cause of action under United States Code, Title 18, Section 3231.

This Court has jurisdiction under Section 1291, Title 18, United States Code.

II.

Statutes Involved.

Title 18, United States Code, Section 371, provides in its pertinent part:

“Section 371—Conspiracy to commit offense or to defraud United States.

“If two or more persons conspire either to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of such conspiracy, each shall be fined not more than \$10,000, or imprisoned not more than five years, or both.”

Title 18, United States Code, Section 1005 provides in its pertinent part as follows:

“Section 1005—Bank entries, reports and transactions. . . .

“Whoever makes any false entry in any book, report or statement of such bank with intent to injure or defraud such bank. . . .

“Shall be fined not more than \$5000 or imprisoned not more than five years, or both.”

III.

Statement of the Case.

The Indictment charges as follows:

“The grand jury charges:

“COUNT ONE

“(U.S. C., Title 18, Section 1005)

“On or about February 18, 1953, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant SALVATORE ANTHONY FERRARO, then being an employee, namely: a teller of the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, did make a false entry in a savings ledger card for the account of defendant WILLIAM ROSS PHILLIPS with intent to injure and defraud said bank, namely: an entry of a deposit of \$10,000.00 to said account, and at the time heretofore mentioned, said bank was a member of the Federal Reserve Bank of San Francisco; and the defendant WILLIAM ROSS PHILLIPS did command, induce and procure the commission of the above offense by defendant SALVATORE ANTHONY FERRARO.

"COUNT TWO

"(U.S.C., Title 18, Section 371)

"Beginning on or about February 18, 1953, and continuing to March 1, 1953, the defendants WILLIAM ROSS PHILLIPS and SALVATORE ANTHONY FERRARO did agree, confederate, and conspire to commit an offense against the United States as follows: defendant SALVATORE ANTHONY FERRARO, an employee of the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, would make a false entry on a savings ledger card for the account of defendant WILLIAM ROSS PHILLIPS showing the deposit of \$10,000.00 to said account, with the intent to injure and defraud said bank which was then and there a member of the Federal Reserve Bank of San Francisco;

"The object of said conspiracy was to be accomplished as follows: the defendant WILLIAM ROSS PHILLIPS would open a savings account in said bank in the sum of \$200.00; thereafter, defendant SALVATORE ANTHONY FERRARO would show on the savings ledger card a deposit of \$10,000.00 to said account; thereafter, said defendant WILLIAM ROSS PHILLIPS would cash checks upon said savings account in an amount in excess of \$9,000.00;

"To effect the object of said conspiracy the defendants committed divers overt acts in the Central Division of the Southern District of California among which were the following:

"(1) On February 18, 1953, the defendant WILLIAM ROSS PHILLIPS opened a savings account at the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, in the amount of \$200.00;

“(2) On February 18, 1953, at Los Angeles, California, defendant SALVATORE ANTHONY FERRARO made a fictitious entry on the savings ledger card of the account of defendant WILLIAM ROSS PHILLIPS in said bank showing a deposit of \$10,000.00 to said account;

“(3) On February 26, 1953, at Los Angeles, California, the defendant WILLIAM ROSS PHILLIPS withdrew \$2,000.00 from said savings account;

“(4) On February 28, 1953, at Los Angeles, California, the defendant WILLIAM ROSS PHILLIPS withdrew \$7,000.00 from said savings account.” [Tr. pp. 2-4.]

On July 27, 1953 appellant Phillips appeared for arraignment and plea represented by Joseph T. Forno, Esquire, before the Honorable Peirson M. Hall, United States District Judge, and entered a plea of not guilty to the offenses charged in the Indictment.

On October 20, 1953 the case was called for trial before the Honorable Harry C. Westover, United States District Judge, sitting with a jury. At the time of trial and before impanelment of the jury, the Indictment against co-defendant Salvatore Anthony Ferraro was dismissed upon motion of the Government.

The case proceeded to trial, and on October 27, 1953 the jury being deadlocked, the trial court declared a mistrial and discharged the jury.

On February 2, 1954 the case was called for re-trial before the Honorable Ben Harrison, United States District Judge, sitting with a jury.

The case proceeded to trial, and on February 9, 1954 the jury returned a verdict of guilty to each count charged in the Indictment. [Tr. p. 6.]

On February 23, 1954 the Honorable Ben Harrison, upon hearing, denied appellant's motion for a new trial filed February 15, 1954. [Tr. p. 11.]

On February 23, 1954 appellant William Ross Phillips was sentenced to imprisonment for a period of five years in a penitentiary on Count One, and a period of five years in a penitentiary on Count Two, both periods of imprisonment to run concurrently.

Appellant assigns as error the judgment of conviction on the following grounds:

- A. The evidence is insufficient to justify the verdict. The verdict is contrary to the law and the evidence. [App. Spec. of Error I; App. Br. p. 5.]²
- B. A person who is not a bank teller cannot be convicted of false entry in the records of a national bank when the charge against the person who actually makes the entry is dismissed. [App. Spec. of Error I(A); App. Br. p. 5.]
- C. The Court erred in the limiting and excluding of the cross-examination of the witness Ferraro particularly when being questioned about his draft evasion and flight. This was necessary in establishing his motive in blaming the appellant. [App. Sec. of Errors III; App. Br. p. 5.]
- D. Count Two fails to charge an offense against the laws of the United States in that the charging part of the Indictment fails to charge appellant with the crime of conspiracy. [App. Spec. of Error II; App. Br. p. 5.]

²"App. Spec. of Error refers to "Appellant's Specification of Errors"; "App. Br." refers to Appellant's Brief.

- E. The district court committed prejudicial error in raising the bail in the trial without notice, without a motion by the Government, and without a hearing. This violated Rule 46(a) Rules of Criminal procedure for the District Court of the United States. [App. Spec. of Error IV; App. Br. p. 5.]
- F. The Court erred in its instructions to the jury. [App. Spec. of Error V; App. Br. p. 6.]
- G. The motion for a new trial should have been granted in view of the affidavit of Althea Hale [R. Tr. 1314], that her testimony in the second trial was false as the result of fear of being embarrassed and threatened with jail if she did not change her testimony. [App. Spec. of Error VI; App. Br. p. 6.]

IV.

Statement of the Facts.

Appellant William Ross Phillips met one Salvatore Anthony Ferraro in 1951. [R. p. 52.]³ After seeing Phillips three or four times in 1951, Ferraro did not see Phillips again until June 1952. [R. pp. 52-53.] In January 1953, Ferraro again met Phillips. [R. pp. 53-54.] Ferraro was then employed by the Bank of America, working at the Western and Santa Monica Branch.

Phillips and Ferraro discussed a business transaction involving the transportation and sale of automobiles to Mexico. [R. pp. 54-55.] Phillips also told Ferraro it would be necessary to get an investor to invest \$10,000 in the venture. [R. p. 56.] Phillips then suggested to

³"R." refers to Reporter's Transcript of Proceedings.

Ferraro that he, Ferraro, take a bank pass book and fill it out to show to prospective investors a deposit of \$10,000. [R. p. 57.] Ferraro did this and gave the book to Phillips. [R. p. 57.]

A few days later, Phillips told Ferraro that this scheme had not worked on the prospective investor. [R. p. 58.] It would be necessary for them to open a legitimate account and have Ferraro make an entry of \$10,000 on the ledger card. [R. p. 58.] This would be necessary to show the prospective investor a deposit had been made at the bank.

On February 18, 1953, Phillips opened an account at the Bank of America, Western and Santa Monica Branch, making an opening deposit of \$200. [R. pp. 32-33.] Phillips was given a signature card which he filled out and returned to the bank clerk. [R. p. 33.] He was given a savings pass book showing an opening deposit of \$200. [Government's Ex. 3; R. p. 35.] A savings ledger card was opened showing an opening deposit of \$200. [Government's Ex. 4; R. p. 42.] Ferraro then made an entry of \$10,000 on the savings ledger card. [R. p. 59.] He received no money at the time the entry was made from the defendant Phillips. [R. p. 59.] There was no savings deposit slip made to support the entry of \$10,000. [R. p. 59.] It was an entry made without receipt of money or voucher—a false entry. At the time of the making of the entry in the savings ledger card, Ferraro was an employee of the Bank of America, Western and Santa Monica Branch. [R. p. 62.] The Bank of America,

Western and Santa Monica Branch, is a member of the Federal Reserve System.

During the two weeks following the making of the entry by Ferraro on the savings ledger card, Phillips made withdrawals of \$100 [Government's Ex. 8], \$2,000 [Government's Ex. 9], and \$7,000. [Government's Ex. 10.]

At the first trial, one Miss Althea M. Hale testified:

“Q. (By Mr. Forno): Miss Hale, I understand you are retired now, but before retirement, what was your business or occupation? A. Before retirement?

Q. Yes. Well, I just was going to school.

Q. You taught school. For how long? A. About 43 years.

Q. That was in the city school district of Los Angeles, is that correct? A. The last 26 years.

Q. Now, Miss Hale, are you acquainted with Mr. Phillips, the gentleman seated over to my right?

A. Yes, sir.

Q. About how long have you known Mr. Phillips?

A. Probably about nine years.

Q. During that time have you had any business transactions with Mr. Phillips where you have given him money? A. Yes.

Q. On about how many occasions? A. Oh, perhaps maybe twice.

Q. Miss Hale, calling your attention to the month of January or February of this year, did you have any conversation with Mr. Phillips concerning putting up some money for him to start a television business?

A. Yes.

Q. About when were these first conversations? Were they in January or February? A. In January.

Q. Then later did you give Mr. Phillips some money? A. Yes.

Q. Calling your attention to the middle of February, particularly February 18th of this year, did you have occasion to see Mr. Phillips at a bank or branch of the Bank of America? A. Yes.

Q. What branch was it? Where did you see Mr. Phillips? A. Western and Santa Monica, Bank of America.

Q. Western and Santa Monica Branch of the Bank of America? A. That is right.

Q. What was the occasion for your meeting him there? Had there been some prearrangement for you to meet him, or did you just happen to be there? A. There had been an arrangement to meet him.

Q. Do you recall the time of day you met him? A. In the morning.

Q. When you met Mr. Phillips, what did you do? What did you do after you met Mr. Phillips? A. Well, I gave him some money to deposit for his program.

Q. This was money that you were investing with him or loaning to him, or something like that? A. That's right.

Q. How much money was it? A. Ten thousand.

Q. \$10,000. Was that in cash or check? A. It was in cash.

Q. Do you recall the denomination of the bills? A. Yes. They were \$100 bills.

Q. After you met Mr. Phillips at this Bank of America, Santa Monica and Western Branch, did you see that money deposited? A. I did.

Q. At the window there? A. Yes. I gave him the money and he made out the slip.

Q. He made out the slip and deposited it? A. Yes.

Q. Did you see an item entered in the bank book by a teller that day? A. Yes, sir.

Q. I show you Defendant's Exhibit B, which purports to be the bank book, Bank of America, the account of William R. Phillips, and call your attention to an item of \$10,000, the second item. Does that appear to be the item that you saw entered in the book that day? A. Yes, sir.

Q. Can you describe the teller, or did you have occasion to notice who the person was, a man or a woman, at the teller's cage when that money was deposited. A. Well, it was a man.

Q. It was a man? A. Yes.

Q. Can you describe him? I mean did you pay any particular attention? A. No. He was a dark complected man.

Q. If you saw him again in court, do you think you would recognize him? A. I doubt it." [R. pp. 256-259.]

At the second trial, Miss Hale testified that she did not meet Phillips on February 18, 1953 at the Bank of America, Santa Monica and Western Branch. [R. pp. 218-219.] On cross-examination, Miss Hale testified she had not given Phillips, or deposited in Phillips' account at any bank, \$10,000. [R. p. 234.]

At the motion for new trial, appellant filed an affidavit of Althea M. Hale, alleging her testimony at the second trial was induced by officers and friends threatening her with jail. [Tr. pp. 13-14.]

Appellant denied essentially all the facts concerning the false entry transactions.

ARGUMENT.

- A. A Person Who Is Not Himself an Employee of a Bank Can Be Convicted of Violation of Title 18, United States Code, Section 1005 (Making a False Entry in the Record of a National Bank).

Title 18, Section 1005, provides in its pertinent part:

“Section 1005—Bank Entries, Reports and Transactions. . . .

“Whoever makes any false entry in any book, report or statement of such bank with intent to injure or defraud such bank, . . .

“Shall be fined not more than \$5000, or imprisoned not more than five years, or both.”

Title 18, Section 2, provides in its pertinent part:

“Section 2—Principals.

“(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission *is a principal*.” (Emphasis ours.)

Appellant Phillips is charged in Count One of the Indictment as follows:

“COUNT ONE

“(U.S.C., Title 18, Section 1005)

“On or about February 18, 1953, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant SALVATORE ANTHONY FERRARO, then being an employee, namely: a teller of the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, did make a false entry in a savings ledger card for the account of defendant WILLIAM ROSS PHILLIPS with intent

to injure and defraud said bank, namely: an entry of a deposit of \$10,000.00 to said account, and at the time heretofore mentioned, said bank was a member of the Federal Reserve Bank of San Francisco; and the defendant WILLIAM ROSS PHILLIPS did command, induce and procure the commission of the above offense by defendant SALVATORE ANTHONY FERRARO.”

A reading of the applicable portion of Section 1005, Title 18, United States Code, discloses that it is not necessary to a violation of this section that the person actually making the entry be a bank employee. Its reference is to “*whoever* makes any false entry” and makes no reference to “officer, director, agent or employee” making a false entry.

Assuming, but not conceding, that it is necessary for an employee to make the entry, a person may be charged and convicted, as appellant Phillips was in the present case, under Title 18, Section 2, as a principal.

The Supreme Court in the case of *United States v. Giles*, 300 U. S. 41, considered a conviction under a provision making it a crime for an employee to make a false entry in the records of a bank where the evidence showed that the entry had been made by an innocent intermediary. The Court said at page 48:

“The statute denounces as criminal one who with intent etc. ‘makes any false entry’. The word ‘make’ has many meanings among them ‘to cause to exist, appear or occur’ Webster’s International Dictionary, Second Ed. To hold the statute broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows gives to the words employed their fair meaning and is in accord with the evident intent of Congress. *To hold*

that it applies only when the accused personally writes the false entry or affirmatively directs another so to do would emasculate the statute to defeat the very end in view.” (Emphasis ours.)

The present case presents stronger facts than the *Giles* case (*Supra*). Phillips concocted the plan originally. [R. pp. 57-58.] He later withdrew the funds. [Government’s Exs. 8, 9 and 10.] It would be impossible to say that he was not at least an aider and abettor as he is charged in the Indictment. As such he could be convicted as a principal pursuant to Title 18, United States Code, Section 2.

B. Count Two of the Indictment Alleges an Offense Against the United States.

Count Two of the Indictment charges:

“COUNT TWO

“(U.S.C., Title 18, Section 371)

“Beginning on or about February 18, 1953, and continuing to March 1, 1953, the defendants WILLIAM ROSS PHILLIPS and SALVATORE ANTHONY FERRARO did agree, confederate, and conspire to commit an offense against the United States as follows: defendant SALVATORE ANTHONY FERRARO, an employee of the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, would make a false entry on a savings ledger card for the account of defendant WILLIAM ROSS PHILLIPS showing the deposit of \$10,000.00 to said account, with the intent to injure and defraud said bank which was then and there a member of the Federal Reserve Bank of San Francisco;

The object of said conspiracy was to be accomplished as follows: the defendant WILLIAM ROSS PHILLIPS would open a savings account in said bank in the sum of \$200.00; thereafter, defendant SALVATORE ANTHONY FERRARO would show on the savings ledger card a deposit of \$10,000.00 to said account; thereafter, said defendant WILLIAM ROSS PHILLIPS would cash checks upon said savings account in an amount in excess of \$9,000.00;

“To effect the object of said conspiracy the defendants committed divers overt acts in the Central Division of the Southern District of California among which were the following:

“(1) On February 18, 1953, the defendant WILLIAM ROSS PHILLIPS opened a savings account at the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, in the amount of \$200.00;

“(2) On February 18, 1953, at Los Angeles, California, defendant SALVATORE ANTHONY FERRARO made a fictitious entry on the savings ledger card of the account of defendant WILLIAM ROSS PHILLIPS in said bank showing a deposit of \$10,000.00 to said account;

“(3) On February 26, 1953, at Los Angeles, California, the defendant WILLIAM ROSS PHILLIPS withdrew \$2,000.00 from said savings account;

“(4) On February 28, 1953, at Los Angeles, California, the defendant WILLIAM ROSS PHILLIPS withdrew \$7,000.00 from said savings account.”

Title 18, Section 371, provides in its pertinent part:

“Section 371—Conspiracy to commit offense or to defraud the United States.

“If two or more persons conspire . . . to commit any offense against the United States . . .

and one or more of such persons does any act to effect the object of the conspiracy, each shall be fined not more than \$10,000, or imprisoned more than five years, or both.”

The crime of conspiracy defined in Title 18, United States Code, Section 371, contemplates a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose. Conspiracy has been described by the Courts as a “partnership in crime”. (*United States v. Kissell*, 218 U. S. 601; *Marino v. United States*, 91 F. 2d 691.)

The Supreme Court in the case of *United States v. Falcone*, 311 U. S. 205, describes a conspiracy at page 210 by saying:

“The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy.”

A conspiracy then requires one, an agreement between two or more persons; two, an unlawful purpose for a lawful purpose procured in an unlawful manner; and, three, an overt act in furtherance of the agreement.

The conspiracy in the present case is charged in the following language:

“Beginning on or about February 18, 1953, and continuing to March 1, 1953, the defendants William Ross Phillips and Salvatore Anthony Ferraro did agree, confederate and conspire to commit an offense against the United States as follows: Defendant Salvatore Anthony Ferraro, an employee of the Bank of America National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, would make a false entry on a savings

ledger card for the account of defendant William Ross Phillips showing the deposit of \$10,000.00 to said account with the intent to injure and defraud said bank which was then and there a member of the Federal Reserve Bank of San Francisco;"

This language charges an agreement to commit an unlawful act, that is to make a false entry in the records of a national bank. Following this language the overt acts committed in furtherance of the conspiracy are alleged. The agreement followed by commission of an overt act completes the conspiracy. The overt act may be committed by any one of the conspirators. It is clear that Count Two makes these necessary allegations and therefore does allege an offense against the United States.

C. There Was No Error in the Limitation of Cross-Examination by Appellant of the Witness Ferraro.

It must be conceded that a full and complete cross-examination of a witness upon the subject of his examination in chief is a right and not a privilege afforded to the party against whom the testimony is being offered. (*Alford v. United States*, 282 U. S. 687; *Lindsey v. United States*, 133 F. 2d 368.)

Beyond that however, the limits of cross-examination are within the broad and sound discretion of the trial court. The discretion of the trial court in limiting cross-examination should be reversed only where manifest error by abuse of discretion is evident. (*Todorow v. United States*, 173 F. 2d 439, 447, cert. den. 337 U. S. 925.)

A reading of the cross-examination of the witness Ferraro [R. pp. 63-80] manifestly shows counsel for ap-

pellant was allowed considerable cross-examination in an attempt to impeach the testimony in chief of the witness Ferraro.

It is submitted there was no abuse of discretion by the trial court in refusing to allow further cross-examination of the witness Ferraro concerning his draft status and therefore the judgment should be affirmed.

D. The Trial Court Committed No Error in Exonerating Appellant's Bail and Raising It to \$10,000 During the Trial.

The problem of bail is regulated at length by rule 46 of the Federal Rules of Criminal Procedure. Rule 46 provides in its pertinent part:

“(a) Right to bail.

“(1) Before conviction. A person arrested for an offense not punishable by death shall be admitted to bail. . . .

“(2) . . .

“(b) . . .

“(c) Amount. If the defendant is admitted to bail the amount thereof shall be such as in the judgment of the Commissioner or Court or Judge or Justice will insure the presence of the defendant having regard to the nature and circumstance of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, and the character of the defendant.”

A further limitation is placed upon the determination of bail by the Federal Constitution Eighth Amendment which provides:

“Excessive bail shall not be required.”

It is apparent therefore that bail before conviction for an offense not punishable by death is a *matter of right*. The amount of that bail is however *a matter within the sound discretion of the trial court*. So long as it is not excessive under the circumstances, a defendant is not prejudiced even though he might not be able to provide the required amount.

Further, excessiveness of bail cannot be urged on appeal after conviction. (*O'Brien v. United States*, 25 F. 2d. 90; *Hewitt v. United States*, 110 F. 2d 1, cert. den. 310 U. S. 641.)

The argument of appellant herein, however appears to proceed upon the theory that the action of the trial court in revoking his bail and increasing it to \$10,000 was prejudicial to the preparation of his defense. This position is untenable as disclosed by the record. [R. 245-247, 250-271.] A reading of this portion of the record would indicate that appellant was deprived of no right to have witnesses on his behalf. On several occasions both the trial court and the United States Attorney offered to secure the appellant's witnesses for him. The processes of the court were open to him. He chose to refuse these opportunities to obtain witnesses in his defense. He should not now be heard to complain of his own voluntary act in refusing the aid of the United States Attorney or the Court. Further, appellant was represented by counsel of his own choosing. Appellant refused to divulge to his counsel the whereabouts of the witnesses he wished to call. [R. p. 247.] It cannot be said any action of the Court resulted in prejudice to his defense. If witnesses were available and not produced the fault must necessarily be with the appellant himself and not with the action of the trial court.

Appellant was charged with serious crimes. After hearing the testimony of Althea M. Hale, the trial court recommended further prosecution of the appellant for subornation of perjury. [R. p. 248.] It was not in abuse of discretion under the circumstances presented here for the trial court to increase appellant's bail, and therefore, the judgment should be affirmed.

E. There Was No Error in the Instructions of the Court.

Appellant's argument here proceeds upon the same theory as the argument presented in I(A) of appellant's opening brief. It is respectfully requested therefore that the Court apply the argument in opposition thereto in this brief as opposition to the point raised here. [Government's Ex. A herein.]

Further, no objection to the instructions pursuant to Rule 30, Federal Rules of Criminal Procedure, was made by counsel for the appellant.

The Federal Rules of Criminal Procedure, Rule 30 provides:

“Rule 30—Instructions.

“At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written request that the Court instruct the jury on the law as set forth in the request. At the same time copies of such request shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the request prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error any portion of a charge or omission therefrom unless he

objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

Failure of counsel for the appellant to make any objection to the instructions as given by the trial court waives this error, if any, and therefore the judgment should be affirmed.

F. There Was No Error in the Denial of Appellant's Motion for a New Trial.

A new trial was requested by appellant Phillips on the ground that one Althea M. Hale had upon the trial of the case testified falsely. This is evidenced by an affidavit filed in support of the motion for a new trial. [Tr. pp. 13-14.] It should be noted at the outset, however, that the Government did not offer the testimony of Althea M. Hale. Her testimony upon the occasion of both trials was offered by and on behalf of the appellant Phillips. [R. pp. 218-235.] Appellant should not now be heard to complain of the nature of this testimony.

A parallel question was recently considered in the case of *United States v. Troche*, 213 F. 2d 401.

In the *Troche* case (*supra*), the defendant was convicted of selling marihuana. At the motion for a new trial the defendant presented a recantation by affidavit of the testimony of the chief government witness against him. At the hearing of the motion a repudiation of the recantation was presented by the Government based on depositions taken of the Government witness involved. The trial judge denied the motion for a new trial. In

affirming the judgment, the Court of Appeals said at page 403:

“Where the newly discovered evidence consists of recantation of testimony given at the trial, such recantation is ‘looked upon with the utmost suspicion’. As this Court pointed out in *Harrison v. United States*, 2 Cir., 7 F. 2d 259, 262. The motion should be granted only when the ‘Court is reasonably well satisfied that the testimony given by a material witness is false,’ and particularly is this true when the recantation has itself been repudiated. *Larrison v. United States*, 7 Cir., 24 F. 2d 82, 87; *Gordon v. United States*, 6 Cir., 178 F. 2d 896, 900.”

See, also:

Harrison v. United States, 7 F. 2d 259, 262.

In the present case the facts are much stronger in support of the trial court's denial of the motion for a new trial. There was a hearing on the motion. It was entertained by the Court and denied. The Court exercised its discretion in that denial. The Court was aware of the testimony of Althea M. Hale at the first trial. The Court also heard the testimony at the second trial. The Court, upon motion for a new trial, had before it the affidavit of Althea M. Hale. The Court denied upon consideration of all these factors the motion for a new trial of appellant Phillips.

Further, Althea M. Hale was not a Government witness. She was called by the defense. Appellant should not now be heard to complain of the testimony given by his own witness.

There was no error in the denial of the motion for a new trial and it is therefore respectfully submitted that the judgment of the trial court should be affirmed.

Conclusion.

There was no error in the rulings of the trial court during the trial of this case and therefore it is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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United States Attorney;

LOUIS LEE ABBOTT,
*Assistant United States Attorney,
Chief of Criminal Division;*

MANUEL L. REAL,
Assistant United States Attorney;

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Attorneys for Appellee.*

No. 14,395

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES E. TOLIVER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

LESLIE C. GILLEN,

GREGORY S. STOUT,

33 Post Street, San Francisco 4, California,

Attorneys for Appellant.

FILED

DEC 16 1950

PAUL P. O'BRIEN,
CLERK

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No. 14,395

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHARLES E. TOLIVER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

Appellant was charged by Indictment filed in the United States District Court for the Northern District of California, Southern Division, within the jurisdiction of said Court, in First Count for violation of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557, alleged to have been committed by Appellant in the City of Oakland, County of Alameda, State of California, on March 7, 1953; in Third Count, with violation of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557, alleged to have been committed by Appellant in the City of Oakland, County of Alameda, State of California, on January 18, 1952; in Fourth Count, with violation of the Jones-Miller Act, 21 U.S.C. 174, alleged to have

been committed by Appellant in the City of Oakland, County of Alameda, State of California, on January 18, 1952; and in Fifth Count with conspiracy, 18 U.S.C. 371, alleged to have been committed by appellant in the Southern Division of the Northern District of California, the overt acts occurring on March 7, and March 11, 1953. (T.R. 2-6.)

The District Court had jurisdiction. 18 U.S.C., Sec. 3231; Rule 18, Federal Rules of Criminal Procedure.

Appellant was sentenced to be imprisoned and was fined \$4.00 by final Judgment made and entered on March 26, 1954. (T.R. 15-20.)

Timely Notice of Appeal to this Court was filed March 26, 1954. (T.R. 21 and 22.) Rule 37a, Federal Rules of Criminal Procedure.

Jurisdiction of this Court to review the final Judgment of the District Court is found in 28 U.S.C., Sections 1291 and 1294.

ABSTRACT OF CASE.

Appellant Charles E. Toliver was convicted of two violations of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557, found to have been committed on March 7, 1953 and January 18, 1952. He was also found guilty of a violation of the Jones-Miller Act, 21 U.S.C. 174, committed on January 18, 1952 and a violation of the conspiracy laws, the overt acts having occurred on March 7 and 11, 1953. (T.R. 2-6.)

The charges were that on the respective days, Appellant illegally sold, concealed or conspired to sell and conceal a quantity of heroin.

Appellant was found guilty on all counts. He was sentenced to prison for a 4 year period and was ordered to pay a fine of \$1.00 upon each count, the said fines to be cumulative. The 4 year sentences upon Counts One and Three involving the two violations of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557 were to run concurrently. The 4 year sentences upon Counts Four and Five involving violation of the Jones-Miller Act, 21 U.S.C. 174 and the conspiracy laws, 18 U.S.C. 371, were likewise to run concurrently one with the other, and consecutively to the previously described sentences for violation of the Harrison Act. (T.R. 15-17.)

The evidence relating to Counts Three and Four, violation of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557, and violation of the Jones-Miller Act, 21 U.S.C. 174, alleged to have been committed on January 18, 1952 is that on that day between 6 and 8 o'clock, P.M., witness Abe Brown met Appellant at a club known as Payne's Corner, located at 7th and Center Streets, Oakland, Alameda County, California. Brown there arranged for and received from Appellant a package said by Appellant to contain "half a piece" or half an ounce of heroin for which Brown paid \$200.00. (R.T. 22:9-25; 23:11-24; 24; 25:1-23; 53:14-20; 69:7-25; 76:15-25.)

The alleged narcotics was contained in a small white wax paper envelope which was handed by Ap-

pellant to Brown. About that time, Brown was illegally selling narcotics and this purchase was sold to his customers. Brown made no taste test to determine if it was heroin nor used none of it himself. Nor is there testimony that the narcotic was "bindle" wrapped as that expression is known to the illicit traffic. The only evidence that the substance handed by Toliver to Brown was in fact a narcotic is Brown's statement "Wasn't heroin I would have to give the people's money back" found on page 79, Reporter's Transcript, lines 23 and 24.

According to Brown and the jury, this is sufficient to prove that the narcotics was in fact sold and concealed. As will be developed subsequently, there are innocent inferences likewise deducible and inferible from this state of facts. The legal sufficiency of the evidence to support this essential element of the Government's case is obviously lacking and will be developed as the principal reason urged for the reversal of the Appellant's conviction upon Counts Three and Four.

The evidence relative to Indictment Counts One and Five is identical save one episode which occurred on March 11, 1953. In brief, witness Brown testified that he, informer Charles Haskell (R.T. 123:13) and Narcotics Agent Malcolm P. Richards went by auto to Payne's Place or Payne's Corner on 7th Street, Oakland, California, arriving at about 5:30 or 6:00 P.M. There, Brown had a conversation with Appellant Toliver. In it, Brown asked for "half a piece" or

half an ounce, and said that the people with him, Agent Richards and informer Charles Haskell wanted to meet him. Toliver replied it would do them no good as he was not dealing. (R.T. 28:13-25; 29:1-9.) Toliver then called over an unidentified man. In Brown's presence, he told this man of Brown's wishes. (R.T. 92:13-25; 93:1-16.) The unidentified man left, returned, and left again. (R.T. 93:17-25; 94:1-22; 95:21-24.) In the meantime, Toliver and Brown again conversed about the unidentified man's whereabouts. (R.T. 31:1-16.) Toliver then permanently left the scene, although in a few minutes, the unidentified man returned to Payne's Place. He ordered Brown, Haskell and Agent Richards to follow him in their car to another location where delivery of the narcotics occurred. Toliver received no money, it being given to the unidentified man (R.T. 100:13-16) and he was not present when the narcotics were passed. (R.T. 98:11-18; 99:12-16.)

Several days later, Brown and Toliver casually met in a San Francisco gambling establishment known as Ernie's on Geary Street. There, Toliver told Brown that the man Brown had brought over to Oakland was a narcotic agent. (R.T. 33:10-25; 103:1-25; 104:1 and 2.) This meeting is referred to in the fifth count of the Indictment as Overt Act Number 2. (T.R. 6.)

Agent Malcolm P. Richards adds little to the legal sufficiency of the evidence against Toliver as to the episode of March 7, 1953. He had a conversation with Toliver wherein Toliver told him that he was not

handling the "stuff, himself, but that my boy was taking care of A.B." referring to witness Brown. (R.T. 125:1-4; 133:17-25; 134:1-14.) Later Toliver told Brown in the agent's presence that he would go and look for the unidentified peddler who had been missing from the scene for about 30 minutes. (R.T. 125:21-25; 126:1-6.) Agent Richards added that several days later at the Geary Street, San Francisco, bar he had a conversation with Appellant about narcotics and that Toliver told Richards not to talk to him about narcotics but to see the unidentified peddler and further that Toliver knew that Richards was in fact an agent. (R.T. 129:21-25; 130:1-14.)

Appellant took the stand in his own defense, He denied any narcotic transaction with A. B. Brown in January, 1952. (R.T. 154:10-25.) As to March 7, 1953, he admitted seeing A. B. Brown at Payne's Place, talking with him about narcotics and pointing out "Brother", a peddler, to Brown. (R.T. 155:1-25.) Toliver likewise admitted seeing Agent Richards at Ernie's, the San Francisco tavern, there having a conversation with him about narcotics (R.T. 160:5-21) and later that same day conversing with Agent Richards in Oakland. (R.T. 162:4-25; 163:1-3.)

During the trial, and also after conviction, but before judgment, Appellant moved the Court for a dismissal of Counts Three and Four of the Indictment which pertain to the episode of January 18, 1952, upon the grounds that the evidence was legally insufficient to support a conviction. Similarly, a

motion was made to dismiss the second overt act in Count Five, the conspiracy charge, on the grounds that the conspiracy had terminated prior to that date. Further, a motion was made to dismiss Count Five on the grounds that no date was therein specified, that particular count of the Indictment thus being uncertain. Motions as to the legal sufficiency of the evidence were likewise made as to Count One of the Indictment, which referred to violation of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557, on March 7, 1953. All these motions were denied. The various specifications of errors relied upon by Appellant will detail these matters.

SPECIFICATIONS OF ERRORS.

1. The District Court erred when it denied Appellant's Motion to Strike Overt Act No. Two, of Count Five of the Indictment.
2. The District Court erred when it sentenced Appellant to serve a 4 year sentence of imprisonment upon Count One of the Indictment and a consecutive 4 year sentence upon Count Five thereof.
3. The District Court erred when it denied Appellant's Motion in Arrest of Judgment with respect to Count Five of the Indictment.
4. The District Court erred when it denied Motions to Acquit Appellant of Counts Three and Four of the Indictment.

5. The District Court erred when it denied Appellant's Motions for New Trial and Arrest of Judgment with respect to Counts Three and Four.

ARGUMENT.

1. APPELLANT'S 4 YEAR SENTENCE UPON COUNT FIVE OF THE INDICTMENT CONSECUTIVE TO COUNT ONE THEREOF IS DOUBLE PUNISHMENT FOR A SINGLE OFFENSE.

Specification of Error No. 1. The District Court erred when it denied Appellant's Motion to Strike Overt Act Two, of Count Five of the Indictment.

Overt Act Two was not an act to further the conspiracy, since at the time of its occurrence, the conspiracy had terminated. By overt act is meant an open act, done to effect the objects of the unlawful partnership, which act need not be itself a crime nor need it include the participation of all the criminal partners.

Pierce v. United States, 252 U.S. 240, 244, 64 L. Ed. 542, 546;

United States v. Rabinowich, 238 U.S. 78, 86, 59 L. Ed. 1211, 1214, 35 Sup. Ct. Rep. 682;

Rose v. United States, 149 Fed. 2d 755;

United States v. Schneiderman, 106 F. Supp. 906, 102 F. Supp. 87.

A conspiracy continues until its ends are accomplished or its abandonment is established or until a

conspirator by affirmative action undertakes some definite and positive action to withdraw therefrom.

United States v. Beck, 118 Fed. 2d 178;

Marino v. United States, 91 Fed. 2d 691;

11 *Cal. Jur.* 2d 230;

People v. Chait, 69 Cal. App. 2d 503;

Loser v. Superior Court, 78 Cal. App. 2d 30.

The sole reason for the requirement that an overt act be proved is to thereafter permit a conspirator to abandon his role in the conspiracy and avoid further legal penalty.

United States v. Britton, 108 U.S. 199, 204, 2 S. Ct. 531, 534, 27 L. Ed. 698;

Burk v. United States, 134 Fed. 2d 879, 882.

Assuming, arguendo, that a conspiracy in fact existed and that Appellant was a co-conspirator on March 7, 1953, the evidence is susceptible of the sole interpretation that by March 11, 1953, he had publicly renounced and abandoned his role therein, so that Appellant's Motion to Dismiss the Second Overt Act of Count Five of the Indictment ought to have been granted. (R.T. 33:10-25; 103:1-25; 104:1 and 2; 129:21-25; 130:1-14; 160:5-21 and 163:1-3.)

Specification of Error No. 2. The District Court erred when it sentenced Appellant to serve a 4 year sentence of imprisonment upon Count One of the Indictment and a consecutive 4 year sentence upon Count Two thereof.

Identical evidence establishes the allegations in Counts One and Five of the Indictment. Thus, a

single offense has been committed which cannot be separated into two offenses so as to inflict double punishment upon Appellant. Identity of offenses is established by identity of parties, dates, time, etc., all of which are equal according to this evidence.

United States v. Katz, 271 U.S. 354, 70 L. Ed. 986;

Sealfon v. United States, 332 U.S. 575, 92 L. Ed. 180;

Pinkerton v. United States, 328 U.S. 640, 643, 90 L. Ed. 1489, 1494;

People v. Logan, 41 Cal. 2d 279, 289 and 290.

-
2. BECAUSE COUNT FIVE OF THE INDICTMENT FAILS TO STATE THE DATE OF THE COMMENCEMENT OR THE DURATION OF THE THEREIN ALLEGED CONSPIRACY, APPELLANT'S MOTION IN ARREST OF JUDGMENT OUGHT TO HAVE BEEN GRANTED UPON THE GROUNDS OF UNCERTAINTY.

Specification of Error No. 3. The District Court erred when it denied Appellant's Motion in Arrest of Judgment with respect to Count Five of the Indictment.

The Sixth Amendment to the United States Constitution requires that the accused be informed of the nature and cause of the accusation. The Fifth Amendment prohibits subjecting any person to double punishment for the same offense. The legal sufficiency of the charging document may be tested before trial

by Demurrer or Motion to Quash and after verdict by Motion in Arrest of Judgment.

Rosen v. United States, 161 U.S. 29, 40 L. Ed. 606, 609.

The recitations in Count Five of the Indictment which set forth the formation of the conspiracy refer to no other clause for certainty as to meaning and particularly do these recitations fail to incorporate by reference the clauses that set forth the overt acts.

Joplin Mercantile Co. v. United States, 236 U.S. 531, 59 L.Ed. 705, 707;

Hyde v. United States, 225 U.S. 347, 32 Sup. Ct. 793, 56 L.Ed. 1114;

Anderson v. United States, 260 Fed. 557.

Total failure to allege a time in the Indictment precludes Appellant from raising the plea of autrefois conviction in the event that he be subsequently indicted for conspiracy on a charge originating from his activities on or about March 7, 1953.

Jarl v. United States, 19 Fed. 2d 891, 892.

To be distinguished, are cases like *Fisher v. United States*, 2 Fed. 2d 843, which improperly cite *Hyde v. United States*, supra, 225 U.S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114 and *Joplin Mercantile Co. v. United States*, supra, 236 U.S. 531, 59 L.Ed. 705, 707, as authority for the proposition that the overt acts are legally incorporated by reference into the charging language describing the acts constituting the conspiracy even though there is in fact no language of incorporation.

Likewise distinguishable from this Indictment are the situations to be found in the following cases:

(1) *Woitte v. United States*, 19 Fed. 2d 506, where the indictment charged a conspiracy “at a time and place to the grand jurors unknown.”

(2) *Rubio v. United States*, 22 Fed. 2d 766, where the indictment was in the same form as in *Woitte v. United States*, supra, 19 Fed. 2d 506, except that there was also the date “January 1, 1924, the exact time”, etc.

(3) *Parmagini v. United States*, 42 Fed. 2d 721, where the indictment read “that the parties conspired at a time and place to the grand jurors unknown”.

(4) *Fiddelke v. United States*, 47 Fed. 2d 751, where the indictment read “on or about June 25, 1930”.

(5) *Heskett v. United States*, 58 Fed. 2d 897, where the indictment read “prior to the dates of the commission of the overt acts hereinafter set forth, and continuing thereafter to and including the date of the finding and presentation of this indictment.”

Appellant's Motion in Arrest of Judgment as to Count Five of the Indictment ought to have been granted on grounds of uncertainty.

3. THE CORPUS DELICTI WAS NOT ESTABLISHED EITHER BY DIRECT OR CIRCUMSTANTIAL EVIDENCE AS TO COUNTS THREE AND FOUR OF THE INDICTMENT.

Specification of Error No. 4. The District Court erred when it denied Motions to Acquit Appellant of Counts Three and Four of the Indictment.

Specification of Error No. 5. The District Court erred when it denied Appellant's Motions for New Trial and Arrest of Judgment with respect to Counts Three and Four.

There is an entire absence of direct evidence, the only circumstantial evidence being an unqualified inferential opinion by Brown that heroin was transferred by Appellant to Brown on January 18, 1952, as charged in Counts Three and Four of the Indictment.

Opinion evidence in Courts of the State of California is admissible if Section 1870, Subdivisions 9 and 10, Code of Civil Procedure are strictly followed. Opinion evidence by an unqualified witness upon a question of science, such as whether or not a given object is heroin should never be admissible in a criminal action, particularly where such an issue of fact is doubtful and one that the jury must ultimately determine.

Union Pacific Railway Co. v. O'Brien, 16 S. Ct. 618, 161 U.S. 451, 40 L. Ed. 766;

Pennsylvania Railroad Co. v. Chamberlain, 53 S. Ct. 391, 288 U. S. 333, 77 L. Ed. 819;

Wesson v. United States, 164 Fed. 2d 50;

Simmons v. United States, 206 Fed. 2d 427.

No testimony was received from an expert user of narcotics that he was familiar with symptoms from long usage and that from the use of this particular narcotic a given series of symptoms were observed, nor was there testimony proffered against Appellant by the Government from an unfamiliar user as to symptoms observed followed by competent medical testimony that a narcotic was in fact used.

Banks v. United States, 147 Fed. 2d 628;
People v. Candalaria, 121 Cal. App. 2d 686;
People v. Tipton, 124 Cal. App. 2d 213.

Appellant's conviction on Counts Three and Four must necessarily be the result of compounding one inference upon another inference where the latter inference is entirely unsupported by competent evidence.

United States v. Gulotta, 29 F. Supp. 947, 950;
Leach v. Board of Dental Examiners, 87 Cal. App. 207, 208.

Appellant's Motions to Acquit and Motions for New Trial of Counts Three and Four of the Indictment ought to have been granted upon the grounds of insufficiency of the evidence.

4. APPELLANT AND COUNSEL FOR APPELLANT RAISE NO ISSUES ON APPEAL WITH RESPECT TO APPELLANT'S CONVICTION AND SENTENCE UPON COUNT ONE OF THE INDICTMENT.
-

CONCLUSION.

The judgment of the District Court ought to be reversed with respect to Counts Three, Four and Five of the Indictment.

Dated, San Francisco, California,
December 15, 1954.

Respectfully submitted,
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No. 14,395

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES E. TOLIVER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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No. 14,395

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHARLES E. TOLIVER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under 18 United States Code, Section 3231, 28 United States Code, Sections 1291 and 1294, Rules 18 and 37(a) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

The appellant was charged in the first four counts of the indictment with substantive violations of the United States narcotic laws. The fifth count charges the appellant with a conspiracy to violate the narcotic statutes. Named in the conspiracy count as a co-conspirator but not as a co-defendant was one Abe

Brown. The co-conspirator Abe Brown had, previous to the time of appellant's trial, plead guilty to one of the narcotic violations charged against appellant (Tr. 20, 40) and appeared as a witness against the appellant.

The second count of the indictment was dismissed by the trial judge at the conclusion of the government's case (Tr. 148). The jury returned a verdict of guilty against appellant on all the remaining counts in the indictment. Appellant was sentenced to four years imprisonment and a fine of \$1.00 on each of the four counts upon which he was convicted. The four year sentences on Counts One and Three were to run concurrently, and the four year sentences on Counts Four and Five were to run concurrently. However, the sentences imposed on Counts Four and Five were to run consecutively with those imposed in Counts One and Three. The fine imposed on each count was cumulative or a total fine of \$4.00. Appeal was timely made to this Court from the judgment of conviction. No error is urged by appellant concerning Count One of the indictment upon which appellant was sentenced to a term of four years.

FACTS.

Co-conspirator Abe Brown had been a dealer in the narcotic trade before he ever met appellant (Tr. 55). He had his first narcotic transaction with appellant some time in December, 1951 (Tr. 73). His testimony is to the effect that at the time and place

mentioned in the third and fourth counts of the indictment he purchased on January 18, 1952 (Tr. 22, 53, 65) one half ounce of a narcotic drug, to-wit, heroin from appellant for the sum of \$200 (Tr. 24, 76). Brown requested a sale of heroin from the appellant (Tr. 79) and sold it to his customers as heroin (Tr. 80). He testified that if the substance received from appellant was not heroin, his customers would demand a refund of their money (Tr. 79, 80). The witness Brown, Richards, a Narcotic Agent, and an informer by the name of Charles Haskell went by automobile to Payne's Place or Payne's Corner at 7th Street in Oakland, California, arriving about 6 P.M. on March 7, 1952 (Tr. 123). This was the same location at which most of the former transactions occurred (Tr. 25). Brown, in company of the Narcotic Agent, requested the appellant to sell him one half ounce of heroin or "a half a piece" (Tr. 69). Appellant said he was not having any hand to hand transactions (Tr. 29) but told Brown that "my boy" would complete the sale of the narcotics (Tr. 125, 133, 134). The appellant, in referring to "my boy" meant "Brother" (Tr. 165). Appellant gave directions to Brother to deliver heroin to the witness Brown (Tr. 106). The purchase price of said heroin was discussed by the appellant with Brown (Tr. 107, 109). At the time of this discussion, Brown requested the appellant to divide the delivery of the heroin into two separate packages and preserve one containing two or three "spoons" for Brown's personal use (Tr. 109).

On March 11, 1952 the defendant Toliver had a conversation with Agent Richards (Tr. 129, 130). This conversation is charged in Overt Act 2 of Count Five of the indictment. The conversation was that in response to statements by Agent Richards concerning the March 7, 1952 sale of narcotics, Toliver said: "Don't talk anything to me about that, see this fellow that you got it from." (Tr. 130).

QUESTION PRESENTED.

I. Was the evidence sufficient to establish that heroin was sold by appellant to the witness Brown on January 18, 1952?

SUMMARY OF ARGUMENT.

I. APPELLANT WAS NOT PREJUDICED BY THE DENIAL OF HIS MOTION TO STRIKE OVERT ACT 2 OF COUNT FIVE OF THE INDICTMENT.

There was admittedly one unobjectionable overt act in the conspiracy count of the indictment. One overt act in furtherance of the conspiracy is all that is necessary for a conviction under Section 371 of Title 18 United States Code. The evidence supports the inference that the conversation referred to in Overt Act 2 was in furtherance of a conspiracy to violate the narcotic statutes. Toliver stated that the Narcotic Agent should talk to another man rather than him about narcotic sales. This was the same kind of conversation which had resulted in a narcotic

sale on March 7, 1952, the conversation which is not complained of in this appeal. There is no evidence which requires a conclusion that Toliver had abandoned his role in the conspiracy by March 11, 1952.

II. DIFFERENT PUNISHMENTS MAY BE IMPOSED FOR A CONSPIRACY TO COMMIT AN OFFENSE AND THE SUBSTANTIVE OFFENSE ITSELF.

It is well settled that an agreement to violate a statute and the violation of the statute itself are two different crimes and may be punished separately.

III. TIME MAY BE FIXED IN A CONSPIRACY INDICTMENT BY THE OVERT ACTS.

The government usually has no knowledge of the exact time or place of the formation of a conspiracy. It is well settled, therefore, that the jurisdiction of the Court may be fixed by the overt acts listed in the conspiracy count of the indictment.

IV. THERE WAS SUFFICIENT EVIDENCE OF THE CORPUS DELICTI.

There was abundant circumstantial evidence that the subject of the sale made on January 18, 1952, which is charged in Counts Three and Four of the indictment, was heroin. Appellant told the witness Brown that it was. Brown, the purchaser, testified that it was. Brown's customers accepted it as heroin

and made no complaint concerning it to Brown. Furthermore, the evidence established Toliver as a narcotic dealer and heroin, testified to as such by experts, was introduced as evidence in the present trial.

ARGUMENT.

I. APPELLANT WAS NOT PREJUDICED BY THE DENIAL OF HIS MOTION TO STRIKE OVERT ACT 2 OF COUNT FIVE OF THE INDICTMENT.

The second overt act of the fifth (conspiracy) count of the indictment reads as follows: "On March 11, 1952, at San Francisco, California, the defendant Charles E. Toliver, alias Little Snooks, had a conversation with Narcotic Agent Malcolm Richards."

Apparently appellant does not dispute the sufficiency of Overt Act 1 in the fifth count of the indictment. He has conceded that his conviction and sentence upon Count One of the indictment is proper (Appellant's Brief, page 15). Count One of the indictment charges that the defendant sold narcotics on March 7, 1952. This March 7 sale was the subject of the conversation referred to in Overt Act 1. Section 371 of Title 18 United States Code requires only that one overt act in furtherance of a conspiracy be proved. *Parmagini v. United States* (9th Cir.), 42 F.2d 721. See also *Rubio v. United States* (9th Cir.), 22 F.2d 766. Since at least one of the overt acts in Count Five of the indictment has not been attacked, the denial of appellant's motion to dismiss the second overt act could not have been prejudicial.

Furthermore, the evidence was not "susceptible of the sole interpretation that by March 11, 1952 he [Toliver] had publicly renounced and abandoned his role" [in the conspiracy] (Appellant's Brief, page 9). Mr. Richards testified that in response to his conversation concerning the March 11 narcotic sale Toliver said: "Don't talk anything to me about that, see this fellow that you got it from." (Tr. 130). He further testified that Toliver later that day questioned him concerning a man named Henry. It was Toliver's defense at the trial of the case that he was not connected with the narcotic transactions charged or with any conspiracy to violate the narcotic laws. However, the jury apparently believed that Toliver had arranged, through another person, to furnish the agent with narcotics. The conversation on March 11 was susceptible to the inference that Toliver desired Richards to deal with whom he had referred to on March 7 as "my boy" (Tr. 125). The conversation of March 7 had resulted in a sale of narcotics. The conversation of March 11 did not result in a sale. However, it is elementary that a conspiracy need not result in a successful breach of law so long as one overt act is done in furtherance of a conspiracy. 18 United States Code, Section 371.

The witness Brown had testified that Toliver told him that he "heard positive that the man [Richards] was an agent" (Tr. 33). Apparently it is this evidence which appellant feels establishes that by March 11 he had abandoned his role in the conspiracy, but the statement reported by Agent Richards indicates

only that Toliver wished Richards to deal through an intermediary and did not desire to deal directly with the agent. The conversation which occurred later that day indicates that Toliver was testing Richards to determine whether or not he was a narcotic agent.

It is clear that Toliver was by March 11 suspicious of Richards. However, the evidence is susceptible to the inference that he had not finally made up his mind and was willing to deal with Richards so long as those dealings were through an intermediary. Toliver was apparently of the view that if he had no "hand to hand dealings" he could not be successfully prosecuted for violation of the narcotic laws.

This interpretation is reinforced by Toliver's conduct on March 7 where he attempted in the presence of the agent to act the role of an innocent bystander while nonetheless setting in motion a transaction which resulted in a sale of narcotics to narcotic agents later that day. There is nothing in the record which requires the jury to find that Toliver had abandoned his role as conspirator when he had the conversation with Agent Richards on March 11 referred to in Overt Act 2. A conspiracy may properly be found to continue until it has been shown to have been abandoned. *McDonald v. United States*, 89 F.2d 128, certiorari denied; *Eldredge v. United States*, 62 F.2d 449.

II. DIFFERENT PUNISHMENTS MAY BE IMPOSED FOR A CONSPIRACY TO COMMIT AN OFFENSE AND THE SUBSTANTIVE OFFENSE ITSELF.

It is well settled that an offense and conspiracy to commit it are separate and distinct offenses. The essence of a conspiracy is the unlawful agreement. *Coates v. United States* (9th Cir.), 59 F.2d 173, 174; *Marino v. United States* (9th Cir.), 91 F.2d 691.

A conspiracy may or may not culminate in the commission of a substantive offense. Appellant cites *Pinkerton v. United States*, 328 U.S. 640, as supporting the proposition that he may not be punished for both a conspiracy to violate the narcotic statutes and for the offense itself. At the very page cited by appellant (page 643) the Supreme Court stated: "It has been long and consistently recognized by the court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and affix to each a different penalty is well established." See also *Blumenthal v. United States* (9th Cir.), 158 F.2d 883; *Kramer v. United States* (9th Cir.), 147 F.2d 202; *Ellerbrake v. United States*, 134 F.2d 683; *United States v. Bazzell*, 187 F.2d 878, certiorari denied; *Maxfield v. United States* (9th Cir.), 152 F.2d 593, certiorari denied. The test to be applied to determine whether there are two offenses or only one is whether each requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U.S. 299.

In the instant case the fact which a conspiracy requires to be proved which the substantive offense does not is an unlawful agreement. The substantive offense on the other hand requires proof that it has in fact been committed while a conspiracy or agreement to commit a crime becomes an indictable offense when any overt act is done in furtherance of it.

III. TIME MAY BE FIXED IN A CONSPIRACY INDICTMENT BY THE OVERT ACTS.

The overt acts in the present indictment set forth a time within the statute of limitations and a place in the Northern District of California. It is well settled in this circuit that both time and place may be fixed by the overt acts in the conspiracy count of an indictment. The time and place of the formation of the conspiracy are immaterial provided any of the overt acts were committed within the jurisdiction of the Court. The government may have no knowledge of the exact time or place of the formation of the conspiracy for conspiracies are naturally secret. *Rubio v. United States* (9th Cir.), 22 F.2d 766; *Parmagini v. United States* (9th Cir.), 42 F.2d 721; *Heskett v. United States* (9th Cir.), 58 F.2d 897; *Woitte v. United States* (9th Cir.), 19 F.2d 506.

IV. THERE WAS SUFFICIENT EVIDENCE
OF THE CORPUS DELICTI.

Appellant argues that the evidence was insufficient to support a conviction on Counts Three and Four of the indictment on the grounds that there was insufficient evidence that heroin was transported from the defendant to the witness Brown on January 18, 1952. As to these counts, there were no narcotics introduced into evidence.

The fact that a substance is narcotics can be proved by circumstantial evidence. *Banks v. United States* (9th Cir.), 147 F.2d 628. It has been held that the testimony of drug addicts based upon their sight and taste is sufficient to establish the *corpus delicti* of a sale and purchase of heroin or marihuana. *United States v. Tramaglino*, 197 F.2d 928, 932.

In one case a test evaporated the heroin prior to trial. The Court held that the agent's testimony, if credible, was sufficient. *United States v. Adelman*, 107 F.2d 497, 498. See also *Pennacchio v. United States*, 263 Fed. 66.

In the present case there was abundant circumstantial evidence that the substance sold on January 18, 1952 was heroin. The evidence established that Toliver had engaged in at least two other narcotic transactions (Tr. 30, 35, 73, 74). The witness Brown testified that on January 18 he asked Toliver for heroin and paid \$200 for half an ounce (Tr. 25, 69, 77). When asked on cross-examination how he knew the substance was heroin he said that he took appellant's word for it but that it was a white powder

and that his customers did not complain about it (Tr. 79). He further testified that the "stuff" was in wax papers. There was evidence as to another narcotic transaction in which the heroin itself had been examined by experts and introduced into evidence. This transaction is apparently conceded by appellant since he raises no question as to the conviction in Count One (Appellant's Brief, page 15).

The jury could have taken the defendant Toliver's word, as transmitted to them by the testimony of the witness Brown, that the substance which changed hands on January 18, 1952 was heroin. Toliver, after all, was in the best position to know whether the substance was heroin or not and he said that it was. His admission on that occasion was in no sense a confession and the *corpus delicti* need not have been established prior to the introduction of his statement. See *Davena v. United States*, 198 F.2d 230; *Wiggins v. United States*, 64 F.2d 950; *Warzower v. United States*, 312 U.S. 342. His statement plus the other corroborative evidence in the case is sufficient, if believed by the jury, to establish the *corpus delicti*.

CONCLUSION.

There was in this case abundant evidence for the jury to find that the defendant Charles E. Toliver violated the narcotic laws of the United States. The questions raised by appellant are, for the most part, an attempt to relitigate issues which have been de-

ided adversely to him by the jury. The judgment of conviction in this case should be affirmed.

Dated, San Francisco, California,
January 17, 1955.

LLOYD H. BURKE,

United States Attorney,

JOHN H. RIORDAN, JR.,

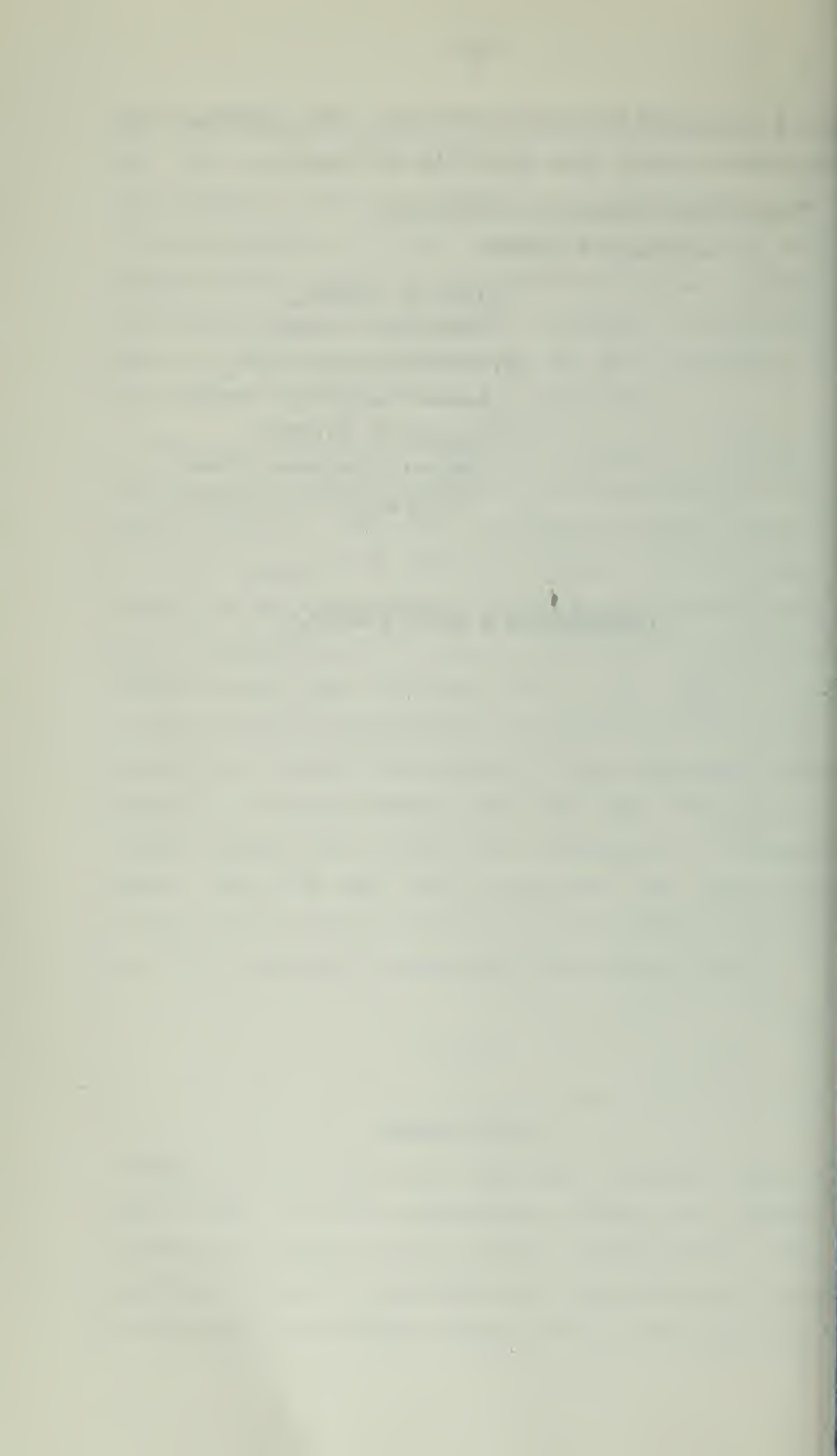
Assistant United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendices A and B Follow.)



Appendices A and B.

Appendix A

STATUTES.

Title 18 United States Code, Section 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 21 United States Code, Section 174

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two years or more than five years. . . .

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26 United States Code, Section 2553

It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing narcotic drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

Title 26 United States Code, Section 2557

(b) *Violations in general.*

(1) Whoever commits an offense or conspires to commit an offense described in this subchapter, subchapter C of this chapter, or parts V and VI of subchapter A of chapter 27, for which no specific penalty is otherwise provided, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years . . .

Appendix B

INDICTMENT.

FIRST COUNT: (Harrison Narcotic Act, 26 U.S.C. 2553, 2557)

The Grand Jury charges that Charles E. Toliver, alias Little Snooks, the defendant herein, on or about the 7th day of March, 1953, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one envelope containing approximately 128 grains of heroin.

SECOND COUNT: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges that Charles E. Toliver, alias Little Snooks, the defendant herein, at the time and place mentioned in the first count of this indictment, within the Southern Division of the Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one envelope containing approximately 128 grains of heroin, and the said heroin had been imported into the United States of America contrary to law, as the said defendant then and there knew.

THIRD COUNT: (Harrison Narcotic Act, 26 U.S.C. 2553, 2557)

The Grand Jury further charges that Charles E. Toliver, alias Little Snooks, the defendant herein, on or about the 18th day of January, 1953, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately 1 ounce of heroin.

FOURTH COUNT: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges that Charles E. Toliver, alias Little Snooks, the defendant herein, at the time and place mentioned in the third count of this indictment, within the Southern Division of the Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately 1 ounce of heroin, and the said heroin had been imported into the United States of America contrary to law, as the said defendant then and there knew.

FIFTH COUNT: (Conspiracy, 18 U.S.C. 371)

The Grand Jury further charges that Charles E. Toliver, alias Little Snooks, the defendant herein, and Abe Brown named herein as co-conspirator but not as

a defendant, did conspire together and with divers other persons whose names are to said Grand Jury unknown, to sell, dispense and distribute, not in or from the original stamped package, a quantity of a derivative and preparation of morphine, to-wit, heroin, in violation of Sections 2553 and 2557 of Title 26 United States Code, and to conceal and facilitate the concealment and transportation of a derivative and preparation of morphine, to-wit, heroin, which heroin had been imported into the United States of America contrary to law, as said defendant then and there well knew, in violation of Section 174 of Title 21 United States Code, and thereafter and during the existence of said conspiracy the said defendant, in the Southern Division of the Northern District of California, did the following acts in furtherance of and to effect the objects of the conspiracy aforesaid.

Overt Acts.

1. On March 7, 1953 in the vicinity of 7th and Center Streets, at Oakland, California, defendant Charles E. Toliver, alias Little Snooks, and co-conspirator Abe Brown had a conversation.

2. On March 11, 1953 at San Francisco, California, the defendant Charles E. Toliver, alias Little Snooks, had a conversation with Narcotic Agent Malcolm Richards.

A True Bill,

.....
Foreman

/s/ Lloyd H. Burke
Lloyd H. Burke
United States Attorney

No. 14396.
IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GUY N. STAFFORD,

Appellant,

vs.

G. M. RUSSELL, JOSEPH R. VAUGHAN, MARY PRATT SANDERS, JOHN B. MADSEN, ANNA B. MADSEN, WILLIAM VAN BEEK, CATHERINE V. VAN BEEK, N. LOUISE KIMBALL, BESSIE S. WEBER, LULU M. REDDISH, BEATRICE CARR ACHSTETTER and WALTER S. BINNS,

Appellees.

BRIEF OF APPELLEES.

VAUGHAN & BRANDLIN and
J. R. VAUGHAN,
411 West Fifth Street,
Los Angeles 13, California,
Attorneys for Appellees.

FILED

AUG 1937

PAUL P. O'BRIEN
CLERK

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No. 14396.

IN THE

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Appellees.

BRIEF OF APPELLEES.

Statement of Pleadings and Facts.

On July 24, 1953, Appellant herein filed his Complaint in the United States District Court, the gist of the Complaint being that the Superior Court of the State of California for the County of Los Angeles, in Case No. 568-668, had rendered an unconscionable judgment against Appellant, which judgment was affirmed by the District Court of Appeal of the State of California, and by reason whereof the appellant had been discriminated against and deprived of due process [Tr. p. 3, line 10; p. 4, line 3].

On August 17, 1953, respondents herein filed their motion to dismiss the action and noticed the same for September 14, 1953 [Tr. p. 47].

On August 21, 1953, the action was dismissed on the application of Appellant and with the approval of Honorable Ben Harrison, Judge of the United States District Court, Southern District of California, Central Division [Tr. p. 52].

Thereafter, and on April 5, 1954, Appellant moved the said District Court to vacate and set aside the dismissal made pursuant to his application [Tr. p. 60]. The basis of the motion was the uncorroborated assertion by Appellant that he had been coerced by the Superior Court Judge, who had tried Case No. 568-668, into dismissing the District Court action [Tr. p. 54; p. 58, line 17]. The motion to vacate the dismissal was denied by order made April 15, 1954 [Tr. p. 112], and Appellant's motion to reconsider was denied by order dated April 23, 1954 [Tr. p. 120].

Appellant filed Notice of Appeal on May 14, 1954 [Tr. p. 125] wherein he purported to appeal from the order of August 21, 1953, dismissing the action and the order of April 15, 1954, denying his motion to vacate [Tr. p. 121].

Jurisdiction on Appeal.

The purported appeal from the judgment of dismissal entered August 21, 1953, was untimely and the appeal should be dismissed.

Fed. Rules Civ. Proc., rule 73, 28 U. S. C. A.

Question.

The sole question presented on this appeal is whether the trial judge abused his discretion in denying Appellant's motion to vacate.

Argument.

1. The judgment of dismissal being final, relief therefrom rested in the sound discretion of the trial court, whose action is not reviewable in the absence of a showing of abuse of discretion. No such showing appears in the record.

Fed. Rules Civ. Proc., rule 60, 28 U. S. C. A.

3 *Barron & Holtzoff Fed. Prac. & Proc.* 253.

2. The sole purpose of the action filed by Appellant is to obtain review of the decision of the California Superior Court in action No. 568-668; under such circumstances no cause of action is stated which falls within the purview of the District Court.

Rooker v. Fidelity Trust Co., 263 U. S. 413, 44 S. Ct. 149, 68 L. Ed. 362;

William v. Tooke (C. C. A. 5th, Tex.), 108 F. 2d 758; Cert. Den. 311 U. S. 655, 85 L. Ed. 419, 61 S. Ct. 8.

Respectfully submitted,

VAUGHAN & BRANDLIN and
J. R. VAUGHAN,

Attorneys for Appellees.



United States
Court of Appeals
for the Ninth Circuit

MOTORES de MEXICALI, S. A., a corporation,
Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION and E. A. LYNCH,
Trustee of the Estate of Erbel, Inc., doing busi-
ness as Bi-Rite Auto Sales, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

AUG 10 1951

PAUL P. O'BRIEN
CLERK

United States
Court of Appeals
for the Ninth Circuit

MOTORES de MEXICALI, S. A., a corporation,
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Trustee of the Estate of Erbel, Inc., doing business as Bi-Rite Auto Sales, bankrupt,
Appellee.

Transcript of Record

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District of California, Central Division

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Los Angeles 14, California.

For Appellee E. A. Lynch, Trustee:

CRAIG, WELLER & LAUGHARN,
817, 111 West Seventh Street,
Los Angeles 14, California.

[1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

In Bankruptcy—No. 57280-WB

In the Matter of ERBEL, INC., dba. BI RITE AUTO SALES, Bankrupt.

DEBTOR'S PETITION

To the Honorable Judge of the District Court of the United States for the Southern District of California:

The Petition of Erbel, Inc., dba Bi Rite Auto Sales, residing at No. 4950 W. Pico Blvd., in City of Los Angeles, County of Los Angeles, State of California, by occupation a used car dealer [or engaged in the business of Used Car Dealer].

Respectfully Represents:

1. Your petitioner has had its principal place of business at 4950 West Pico Blvd., within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all its property for the benefit of its creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule marked Schedule A will be filed within ten days.

4. The schedule marked Schedule B will be filed within ten days.

Wherefore Your Petitioner Prays, That it may

be adjudged by the court to be a bankrupt within the purview of said Act.

ERBEL, INC.,

/s/ DAVID COWAN, President
Petitioner

QUITTNER & STUTMAN,

/s/ By JOLLY STUTMAN,
Attorney for Petitioner

United States of America,
Southern District of California,
County of Los Angeles—ss.

Oath For Corporation

I, David Cowan, President of Petitioner, do hereby make solemn oath that I am the President of the corporation which is the Petitioning Debtor mentioned in the foregoing petition and which corporation is duly organized under the laws of the State of California and engaged in the business of Used Cars and is not a municipal railroad, insurance nor banking corporation, and that I am duly authorized in the premises; that a copy of the vote or resolution authorizing the filing of this petition is attached hereto, made part hereof and marked Exhibit "C", and I do hereby make solemn oath that the statements contained in the above petition are true according to the best of my knowledge, information and belief.

/s/ DAVID COWAN,
Officer of Corporation

Subscribed and sworn to before me this 2nd day of July, A. D. 1953.

[Seal] /s/ SILVIA L. LAITZ,
Notary Public in and for said County and State. [2]

Exhibit "C"

Resolved, that the President of this Corporation be and he is hereby authorized and directed to execute such documents and to take such steps as may be necessary or required on behalf of the Corporation in connection with the filing of a voluntary petition in bankruptcy under the Bankruptcy Act, in the District Court of the United States, Southern District of California, Central Division.

Further Resolved, that the President of this Corporation be and he is hereby authorized and directed to retain Quittner and Stutman, attorneys, of Los Angeles, California, as counsel to represent the Corporation in the above proceedings.

The undersigned, Secretary of Erbel, Inc., does hereby certify that the foregoing is a full, true and correct copy of a resolution duly adopted at a special meeting of the Board of Directors of said corporation held on July 2, 1953, and that the same has not been revoked or rescinded, and is still in full force and effect.

[Seal] /s/ ERVIN G. RESNICK,
Secretary. [3]

[Endorsed]: Filed July 2, 1953.

[Title of District Court and Cause.]

ORDERS OF ADJUDICATION AND OF
GENERAL REFERENCE

At Los Angeles, in said District, on July 2, 1953.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings herein-after mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number 57280-WB. Title of Proceedings: Erbel, Inc., dba Bi Rite Auto Sales. Filed 7/2/53. Referee: Hugh L. Dickson, Esq., Los Angeles, California.

HARRY C. WESTOVER,

United States District Judge [4]

[Endorsed]: Filed July 2, 1953.

[Title of District Court and Cause.]

PETITION TO RECLAIM PROPERTY

To Honorable Hugh L. Dickson, Referee in Bankruptcy:

Comes Now Bank of America National Trust and Savings Association, and respectfully represents:

I.

A petition in bankruptcy has been filed by the above-named bankrupt on July 2, 1953.

II.

At the time of the filing of the aforesaid petition in bankruptcy the bankrupt had in his possession certain motor vehicles more particularly described in columns one and two of Schedule "A" annexed hereto and had in his possession the proceeds of sale of seven (7) motor vehicles, more particularly described in columns one and two of Schedule "B" annexed hereto.

III.

That said motor vehicles hereinabove mentioned, and more particularly described in columns one and two of Schedule "A" [5] annexed hereto, are the property of petitioner herein; that said motor vehicles are included in and are the subject of certain trust receipt certificates made, executed and delivered by the bankrupt to petitioner on or about the dates shown in Column three of Schedule "A" annexed hereto.

IV.

That the balances owing petitioner under the said trust receipts set forth in Schedule "A" are in the sum of Twenty-Three Thousand Three Hundred and Sixty-Three Dollars (\$23,363.00), which sum is the aggregate of the sums owing petitioner on the items listed in Columns One and Two of Schedule "A" annexed hereto; that the unpaid balances owing on each particular item of equipment listed in Columns One and Two of Schedule "A" annexed hereto are set forth in Column Four of Schedule "A" annexed hereto.

V.

That no part of said indebtedness has been paid by the bankrupt, and there is now due, owing and unpaid your petitioner thereon the sum of Twenty-Three Thousand Three Hundred and Sixty-Three Dollars (\$23,363.00).

VI.

The said motor vehicles hereinabove mentioned and described in Columns One and Two of Schedule "B" annexed hereto were the property of petitioner herein; that said seven (7) motor vehicles are included in and are the subject of certain trust receipt certificates made, executed and delivered to petitioner by the bankrupt; and that while said seven (7) motor vehicles were in the possession of bankrupt, said seven (7) motor vehicles were sold and the proceeds of sale were not delivered or paid over to petitioner herein and that under said trust receipt certificates the bankrupt did agree to hold the automobiles and the [6] proceeds of sale thereof

in trust for your petitioner; that petitioner is informed and believes and therefore alleges that respondent now holds said proceeds of sale in trust for your petitioner and the balance of said proceeds now due your petitioner from said sale of said seven (7) motor vehicles is the sum of Six Thousand Nine Hundred Fifty-Nine Dollars (\$6,959.00) which sum is the aggregate of the sums owing petitioner on the items listed in Schedule "B" annexed hereto as more particularly set forth in Column Four of said schedule.

VII.

That E. A. Lynch has been appointed Trustee of the above bankrupt estate. That the aforesaid motor vehicles set forth in Schedule "A" annexed hereto and said proceeds of sale of motor vehicles described in Schedule "B" annexed hereto are in the possession of the said Trustee.

VIII.

That petitioner has on July 3, 1953, demanded of the said E. A. Lynch, Trustee, that he either abandon the said motor vehicles described in Schedule "A" annexed hereto to your petitioner or sell the same forthwith and pay the respective balances owing your petitioner under the aforesaid trust receipts and to deliver pay over to your petitioner herein out of the proceeds of sale of said motor vehicles described in Schedule "B" annexed hereto the sum of Six Thousand Nine Hundred Fifty-Nine Dollars (\$6,959.00) but that the said E. A. Lynch, Trustee, has failed and refused and still

fails and refuses to either abandon the said motor vehicles described in Schedule "A" or to sell the same and pay off the said sum of Twenty-Three Thousand Three Hundred and Sixty-Three Dollars (\$23,363.00) owing to your petitioner as requested. Said Trustee has further failed and refused and still fails and refuses to deliver or pay over to petitioner out of [7] said proceeds of sale of said motor vehicles described in Schedule "B" annexed hereto the sum of Six Thousand Nine Hundred and Fifty-Nine Dollars (\$6,959.00).

IX.

That the reasonable market value of said motor vehicles set forth in Columns One and Two of Schedule "A" annexed hereto, is less than Twenty-Three Thousand Three Hundred and Sixty-Three Dollars (\$23,363.00).

Wherefore, your petitioner prays:

1. That this Court determine that there is no equity in the aforesaid motor vehicles described in Schedule "A" annexed hereto for the bankrupt estate herein;
2. That the Trustee E. A. Lynch be authorized and directed to abandon said motor vehicles described in Schedule "A" annexed hereto to your petitioner;
3. That the Trustee E. A. Lynch be authorized and directed to deliver and pay over to your petitioner from the proceeds of sale of said motor vehicles described in Schedule "B" annexed hereto

the sum of Six Thousand Nine Hundred and Fifty-Nine Dollars (\$6,959.00).

HUGO A. STEINMEYER,
ROBERT H. FABIAN and
ROBERT VAN BUSKIRK,

/s/ By ROBERT H. FABIAN,
Attorneys for Petitioner Bank of America National
Trust and Savings Association. [8]

Schedule "A"

Description	Motor & License No.	Date 1953	Present Balance
1951 Pontiac CaCpChSu	Mot. No. P8UH62145 Lic. No. 1W60610	Jan. 5	\$1,179.00
1950 Merc. 6P CP	Mot. No. 50LA30465M Lic. No. 1W60734	Jan. 12	855.00
1952 Pontiac Sup Cata	Mot. No. P8WH5586 Lic. No. 1W29446	Feb. 25	1,435.50
1952 Lincoln Club Cosmo	Mot. No. 52LP5111H Lic. No. 1W29462	Feb. 25	1,921.50
1951 Pontiac Sup Cat	Mot. No. P8UH102812 Lic. No. 1W29453	Feb. 28	1,323.00
1952 Lincoln SpCpSpCa	Mot. No. 52LP17934H Lic. No. 1X816219	Mar. 10	2,400.00
1952 Pontiac 4 Dr Sd	Mot. No. P6WH-1499 Lic. No. 1X81637	Mar. 12	1,380.00
1950 Buick 8 Sup 4 Dr Dyn	Mot. No. 57791454 Lic. No. 8R2109	Mar. 25	1,125.00
1951 Chev. Fl Dlx 4 Dr	Mot. No. JAD921334 Lic. No. 1X32664	Mar. 31	975.00
1951 Buick 48D-2 Dr Dyno	Mot. No. 65129114 Lic. No. 1X32661	Apr. 6	1,200.00
1950 Olds 8 98Dlx 4 Dr Hydro	Mot. No. 8A357041H Lic. No. 1X32666	Apr. 8	1,137.00
1949 Cad. 60 Fleetwood Hydr	Mot. No. 4960-01843 Lic. No. 1V35730	Apr. 13	1,472.00
1950 Buick 56R Riv Dyno	Mot. No. 58814695 Lic. No. 1X32656	Apr. 14	1,237.00

Description	Motor & License No.	Date	Present Balance
1947 Olds 8 98 Conv Hydr	Mot. No. 8102960HS Lic. No. 1R65634	1953 Apr. 20	588.00
1949 Buick Rdmst Riv Cpe Dyno	Mot. No. 55256587 Lic. No. 1S55225	Apr. 24	1,012.00
1951 Buick Riv Sup Cpe Dyno	Mot. No. 65010995 Lic. No. 1W60040	Apr. 24	1,425.00
1947 Olds 8 98 Conv. Cpe Hydr	Mot. No. 883797HS Lic. No. 8N71691	May 18	562.00
1952 Chev SyDlx 4 Dr	Mot. No. KAA49792 Lic. No. 1Y97954	May 19	1,068.00
1952 Chev SyDlx 4 Dr	Mot. No. KAA14323 Lic. No. 1Y97952	May 19	1,068.00

23,363.00

Schedule "B"

Description	Motor and License No.	Date	Present Balance
1948 Lincoln SpSd9EL	Mot. No. 9EL5557 Lic. No. 6A41453	1953 Jan. 27	\$ 688.00*
1948 Hudson 6 Sup 4 Dr	Mot. No. 48123393 Lic. No. 3J2030	Apr. 20	525.00*
1948 Cad 62 Conv Hydr	Mot. No. 486238723 Lic. No. 1S67865	Apr. 29	1,237.00
1949 Pont. 8 Sl Dlx SdCp Hydr	Mot. No. C8RH5335 Lic. No. 1R44260	Apr. 29	877.00
1952 Buick Riv Sup Dyno	Mot. No. 66741345 Lic. No. 1Y61107	May 9	1,612.00
1950 Chev. Sty Dlx Clb Cpe	Mot. No. HAA702291 Lic. No. 1Y61111	May 9	798.00
1953 Pont. 6 Std 2 Dr	Mot. No. P6XS1570 Lic. No. 1Y97956	May 19	1,222.00*

\$6,959.00

* Marginal note in ink: Pd.

[Endorsed]: Filed July 29, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Bank of America National Trust & Savings Association, and Hugo A. Steinmeyer, Robert H. Fabian and Robert Van Buskirk, its attorneys. E. A. Lynch, Trustee, and Craig, Weller & Laugharn, his attorneys

Please Take Notice that on August 13, 1953, at 10 a.m. in the courtroom of Hugh L. Dickson, Referee in Bankruptcy, 339 Federal Building, Los Angeles, California, Ernest R. Utley, attorney for Motores de Mexicali, S. A. a corporation of the United States of Mexico, will move the above entitled Court for leave to file the Answer, Affirmative Defense and Cross Petition of Motores de Mexicali, S. A., a corporation of the United States of Mexico.

Said motion will be based upon the files and records in the above entitled case and upon said answer, affirmative defense and cross petition.

Dated: August 12, 1953.

JOHN L. MACE and
ERNEST R. UTLEY,
/s/ By ERNEST R. UTLEY,
Attorneys for Motores de
Mexicali. [11]

ANSWER, AFFIRMATIVE DEFENSE AND
CROSS PETITION OF MOTORES de
MEXICALI, S. A.

Comes now Motores de Mexicali, S. A., a corporation of the United States of Mexico, a creditor and interested party to the within proceeding and with permission of the Court first having been had and obtained, files this its answer to the petition of the Bank of America National Trust and Savings Association to reclaim property, and admits, denies, alleges and states:

I.

Admits the allegations contained in Paragraphs I and II of said petition.

II.

Answering Paragraph III of said petition, denies that the automobiles described in Schedule A attached to the petition as follows, to-wit:

1951 Buick 48D-2 Dr. Dyno. Mot. No. 65129114,
Lic. No. 1X32661.

1950 Olds. 8 98Dlx 4 Dr. Hydro, Mot. No. 8A-
357041H, Lic. No. 1X32666.

1952 Chev. SyDlx 4 Dr., Mot. No. KAA49792,
Lic. No. 1Y97954.

1952 Chev. SyDlx 4 Dr., Mot. No. KAA14323,
Lic. No. 1Y97952. [12]

are the property of the petitioner, Bank of America National Trust and Savings Association, and denies that said Bank of America National Trust

and Savings Association has a valid claim to said automobiles under and by virtue of certain trust receipt certificates made, executed and delivered by the bankrupt to the petitioner or otherwise.

Further answering said Paragraph III, Motores de Mexicali alleges that at all times mentioned in the petition to reclaim property herein, said Bank had knowledge that the possession of said automobiles had been acquired by the bankrupt from Motores de Mexicali and had not been paid for, and also had knowledge of all of the facts set forth in the affirmative defenses and cross-petition herein.

Further answering Paragraph III of said petition, Motores de Mexicali has no sufficient information or belief to enable it to answer the allegations in Paragraph III as to the remaining automobiles described therein and basing its answer thereon, denies generally and specifically each and every allegation contained in said paragraph not herein otherwise specifically denied.

Alleges that Motores de Mexicali is the owner of and entitled to the immediate possession of the automobiles above described for the reasons hereinafter alleged.

III.

Motores de Mexicali has no information or belief sufficient to enable it to answer the allegations contained in Paragraphs IV and V of said petition and basing its answer thereon, denies generally and specifically each and every allegation contained in each of said paragraphs.

IV.

Answering Paragraph VI of said petition, Motores de Mexicali denies that the automobile described in Schedule B [13] attached to the petition as:

1952 Buick Riv. Sup. Dyno, Motor No. 66741345, Lic. No. 1X61107 is or was the property of petitioner, Bank of America National Trust and Savings Association, and further denies that said vehicle is or was subject to any valid trust receipt certificate made, executed and delivered by the bankrupt or otherwise.

Further answering Paragraph VI of said petition, Motores de Mexicali alleges that at all times mentioned in the petition to reclaim property herein, said Bank had knowledge that the possession of said automobile had been acquired by the bankrupt from Motores de Mexicali and had not been paid for, and also had knowledge of all of the facts set forth in the affirmative defenses and cross-petition herein.

Motores de Mexicali alleges that said automobile described in this paragraph was and is the property of Motores de Mexicali and that said Motores de Mexicali is entitled to said automobile or any funds in the possession of the trustee received from the sale of said automobile for the reasons herein-after alleged.

Motores de Mexicali has no sufficient information or belief to enable it to answer as to the remaining automobiles or funds received from the sale of the automobiles described in Paragraph VI of said

petition, and basing its denial upon that ground, denies generally and specifically each and every allegation therein contained.

V.

Admits the allegations contained in Paragraph VII of said petition.

VI.

Motores de Mexicali has no information or belief sufficient to enable it to answer the allegations contained in Paragraphs VIII and IX of said petition and basing its denial upon that ground, denies generally and specifically each and every [14] allegation contained in each of said paragraphs.

First Affirmative Defense and Cross-Petition

By way of an affirmative defense to the petition in reclamation of the Bank of America National Trust and Savings Association and by way of cross-petition herein, Motores de Mexicali alleges:

I.

That at all times herein mentioned, cross-petitioner was and is now a corporation, duly created, organized and existing under and by virtue of the laws of the United States of Mexico, with its principal office at Mexicali, Baja California, Mexico.

II.

That on or about the 6th day of March, 1953, cross-petitioner herein was the owner and in possession of the following automobiles described in

Schedule A attached to the petition of the Bank of America National Trust and Savings Association herein, to-wit:

1951 Buick 48D-2 Dr. Dyno, Mot. No. 65129114,
Lic. No. 1X32661.

1950 Olds 8 98Dlx 4 Dr. Hydro, Mot. No. 8A-
357041H, Lic. No. 1X32666.

and on or about the 2nd day of April, 1953, was the owner and in possession of the following automobiles described in Schedule A attached to the petition of the Bank of America National Trust and Savings Association herein, to-wit:

1952 Chev. SyDlx 4 Dr. Mot. No. KAA49792,
Lic. No. IY97954.

1952 Chev. SyDlx 4 Dr. Mot. No. KAA14323,
Lic. No. IY97952.

and

1952 Buick Riv. Sup. Dyno, Mot. No. 66741345,
Lic. No. 1Y61107 described in Schedule B attached to said petition. That on the dates hereinabove mentioned, said automobiles had a reasonable value as follows: 1951 Buick - \$1300.00; 1950 Olds - \$1350.00; 1952 Chev. - \$1350.00; 1952 Chev. - \$1350.00; 1952 Buick - \$2000.00. [15]

III.

That on or about the 6th day of March, 1953, an oral agreement was made and entered into between cross-petitioner and the bankrupt herein, under which the bankrupt herein agreed to purchase from cross-petitioner the 1951 Buick and 1950 Olds mentioned and described in Paragraph II hereof

and agreed to pay therefor in cash the sum of \$1300.00 for the Buick and \$1350.00 for the Olds.

IV.

That at the time of said sale, the bankrupt executed and delivered to cross-petitioner the following drafts:

“ Automobile Purchase Draft

3 6 53 19....

Upon presentation of this draft to the bank designated below for Collection Together With the documents, properly executed, indicated on the reserve hereof

Pay to Motores de Mexicali SA.....\$1300.00

Thirteen Hundred and no/00..... Dollars

(Year) 1951 (Make) Buick (Type) 2-dr.

Special (Motor No.) 65129114.

This Draft Will Be Honored With No Protest

Payable Through: Wilshire-LaBrea Branch 16-146
Bank of America, National Trust and Savings
Association, Los Angeles, California.

Bi-Rite Auto Sales

/s/ Mario Rodriguez

Collection Only

Instructions to Dealer: This draft may be presented in person to the drawee Branch or through your local bank.”

“ Automobile Purchase Draft

3 6 53 19....

Upon presentation of this draft to the bank designated below [16] For Collection Together With the documents, properly executed, indicated on the reserve hereof

Pay to Motores de Mexicali SA.....\$1350.00

Thirteen Hundred Fifty and no/100..Dollars

(Year) 1950 (Make) Oldsmobile. (Type) 4-dr. sedan “98”. (Motor No.) 8A3570418.

This Draft Will Be Honored With No Protest

Payable through Wilshire-La Brea Branch 16-146
Bank of America, National Trust and Savings
Association, Los Angeles, California.

Bi-Rite Auto Sales
/s/ Mario Rodriguez

Collection Only

Instructions to Dealer: This draft may be presented in person to the drawee Branch or through your local bank.”

V.

That said drafts were then and there received by cross-petitioner as conditional payment for said automobiles; said drafts were duly presented by cross-petitioner in due course for payment to the Bank of America National Trust and Savings Association, Wilshire-LaBrea Branch, Los Angeles, California, and payment of said drafts were dis-

honored, and the bankrupt, due to its insolvency, was financially unable to and did not make payment of the sums evidenced by said drafts at any time and said drafts were at all times worthless and of no value to cross-petitioner.

VI.

That by reason of the premises, cross-petitioner is an unpaid seller under and pursuant to the provisions of Section 1772 of the Civil Code of the State of California, and is entitled to the possession of said automobiles and title thereto.

Second Affirmative Defense and Cross-Petition

By way of a second affirmative defense to the petition in reclamation of the Bank of America National Trust and Savings [17] Association and by way of cross-petition herein, Motores de Mexicali alleges:

I.

Cross-petitioner adopts the allegations in Paragraphs I and II of its first affirmative defense and cross-petition herein without the necessity of setting forth the same in full.

II.

That on or about the 2nd day of April, 1953, an oral agreement was made and entered into between cross-petitioner and the bankrupt herein, under which the bankrupt herein agreed to purchase from cross-petitioner the two 1953 Chevrolets and the 1952 Buick mentioned and described in Paragraph II of the first affirmative defense and cross-

petition herein, and agreed to pay therefor in cash the sum of \$1350.00 for each of the two Chevrolets and \$2000.00 for the Buick.

III.

That at the time of said sale, the bankrupt executed and delivered to cross-petitioner the following drafts:

“ Automobile Purchase Draft

April 2, 1953

Upon presentation of this draft to the bank designated below For Collection Together With the documents properly executed, indicated on the reserve hereof

Pay to Motores de Mexicali, S A.....\$1,350.00
One Thousand Three Hundred and fifty and
no/100 Dollars

(Year) 1952 (Make) Chevrolet (Type) Sedan
4 door (Motor No.) KAA49792.

This Draft Will Be Honored With No Protest

Payable through Wilshire-LaBrea Branch 16-146
Bank of America, National Trust and Savings
Association, Los Angeles, California.

Bi-Rite Auto Sales

/s/ Mario Rodriguez

Collection Only

[18]

Instructions to Dealer: This draft may be presented in person to the drawee Branch or through your local bank.”

“ Automobile Purchase Draft

April 2, 1953

Upon presentation of this draft to the bank designated below For Collection Together With the documents, properly executed, indicated on the reserve hereof

Pay to Motores de Mexicali, S. A. . . . \$1,350.00
One Thousand Three Hundred and Fifty and
no/100 Dollars

(Year) 1952 (Make) Chevrolet (Type) 4 door
Sedan (Motor No.) KAA14323.

This Draft Will Be Honored With No Protest

Payable Through Wilshire-LaBrea Branch 16-146
Bank of America, National Trust and Savings
Association, Los Angeles, California.

Bi-Rite Auto Sales
/s/ Mario Rodriguez

Instructions to Dealer: This draft may be presented in person to the drawee Branch or through your local bank.”

“ Automobile Purchase Draft

April 2, 1953

Upon presentation of this draft to the bank designated below For Collection Together With the documents, properly executed, indicated on the reserve hereof

Pay to Motores de Mexicali, S. A. . . . \$2,000.00
Two thousand and no/100 Dollars

(Year) 1952 (Make) Buick (Type) Riviera.
(Motor No.) 66741345. [19]

Payable through Wilshire-LaBrea Branch 16-146
Bank of America, National Trust and Savings
Association, Los Angeles, California.

This Draft Will Be Honored With No Protest

Bi-Rite Auto Sales

/s/ Mario Rodriguez

Collection Only

Instructions to Dealer: This draft may be presented in person to the drawee Branch or through your local bank."

IV.

That said drafts were then and there received by cross-petitioner as conditional payment for said automobiles; said drafts were duly presented by cross-petitioner in due course for payment to the Bank of America National Trust and Savings Association, Wilshire-LaBrea Branch, Los Angeles, California, and payment of said drafts were dishonored, and the bankrupt, due to its insolvency, was financially unable to and did not make payment of the sums evidenced by said drafts at any time and said drafts were at all times worthless and of no value to cross-petitioner.

V.

That by reason of the premises, cross-petitioner

is an unpaid seller under and pursuant to the provisions of Section 1772 of the Civil Code of the State of California, and is entitled to the possession of said automobiles and title thereto.

Third Affirmative Defense and Cross-Petition

By way of a third affirmative defense to the petition in reclamation of the Bank of America National Trust and Savings Association and by way of cross-petition herein, Motores de Mexicali alleges:

I.

Cross-petitioner adopts the allegations contained in its first affirmative defense and cross-petition herein without [20] the necessity of setting forth the same in full.

II.

That at the time said drafts mentioned in the first affirmative defense and cross-petition herein were issued and delivered by the bankrupt to cross-petitioner, the bankrupt falsely and fraudulently represented to cross-petitioner that said drafts would be paid upon their presentation to the Bank of America National Trust and Savings Association, Wilshire-LaBrea Branch, Los Angeles, California, and that at the time the bankrupt was solvent and financially able to make payment of said drafts upon presentation to said bank. That in reliance upon said representations and each of them and believing same to be true, cross-petitioner did then and there deliver possession of said auto-

mobiles and evidence of title thereto to the bankrupt and it was understood and agreed that title in said automobiles was only conditional and that title thereto would become absolute in the bankrupt upon the payment of said drafts.

That the representations made by the bankrupt as herein alleged were all false and untrue in that said bankrupt was then insolvent and not in a financial position to make payment of said drafts and the bankrupt at no time had any intention of making payment of said drafts, or any of them, upon their presentation to the said bank or otherwise and said drafts have never been paid.

III.

That cross-petitioner believed said automobiles had been sold by the bankrupt to a bona fide purchaser prior to its discovery of said fraud and did not know said automobiles were still in the possession of the bankrupt until after the election of the trustee in bankruptcy herein; that immediately upon discovery that the trustee in bankruptcy had possession of said automobiles, cross-petitioner gave notice to said trustee in bankruptcy that cross-petitioner had title in and to said automobiles and made demand upon said trustee for the possession of same. [21]

Fourth Affirmative Defense and Cross-Petition

By way of a fourth affirmative defense to the petition in reclamation of the Bank of America National Trust and Savings Association and by

way of cross-petition herein, Motores de Mexicali alleges:

I.

Cross-petitioner adopts the allegations contained in its second affirmative defense and cross-petition herein without the necessity of setting forth the same in full.

II.

That at the time said drafts mentioned in the second affirmative defense and cross-petition herein were issued and delivered by the bankrupt to cross-petitioner, the bankrupt falsely and fraudulently represented to cross-petitioner that said drafts would be paid upon their presentation to the Bank of America National Trust and Savings Association, Wilshire-LaBrea Branch, Los Angeles, California, and that at the time the bankrupt was solvent and financially able to make payment of said drafts upon presentation to said bank. That in reliance upon said representations and each of them and believing same to be true, cross-petitioner did then and there deliver possession of said automobiles and evidence of title thereto to the bankrupt and it was understood and agreed that title in said automobiles was only conditional and that title thereto would become absolute in the bankrupt upon the payment of said drafts.

That the representations made by the bankrupt as herein alleged were all false and untrue in that said bankrupt was then insolvent and not in a financial position to make payment of said drafts and the bankrupt at no time had any intention of

making payment of said drafts, or any of them, upon their presentation to the said bank or otherwise and said drafts have never been paid. [22]

III.

That cross-petitioner believed said automobiles had been sold by the bankrupt to a bona fide purchaser prior to its discovery of said fraud and did not know said automobiles were still in the possession of the bankrupt until after the election of the trustee in bankruptcy herein; that immediately upon discovery that the trustee in bankruptcy had possession of said automobiles, cross-petitioner gave notice to said trustee in bankruptcy that cross-petitioner had title in and to said automobiles and made demand upon said trustee for the possession of same.

Wherefore, cross-petitioner prays that it be permitted to file its answer, affirmative defenses and cross-petition herein; that it be decreed to be the owner of and entitled to immediate possession of the automobiles herein set forth and that the trustee deliver possession thereof to cross-petitioner; that the Court determine that the Bank of America National Trust and Savings Association has no valid pledge, mortgage, claim or lien upon said automobiles or any of them under the trust receipt certificates alleged in its petition for reclamation, or otherwise; that in the event the trustee cannot deliver said automobiles to cross-petitioner in their original form and is in position to deliver said property in a modified form, that the trustee be

required so to do, and for such other and further relief as the Court may deem just and proper in the premises.

JOHN L. MACE and
ERNEST R. UTLEY,
/s/ By ERNEST R. UTLEY,
Attorneys for cross-petitioner. [23]

Duly Verified. [24]

Acknowledgment of Service attached. [25]

[Endorsed]: Filed August 13, 1953.

[Title of District Court and Cause.]

ANSWER TO ORDER TO SHOW CAUSE

Comes now E. A. Lynch, trustee in bankruptcy, and in answer to the "Petition to Reclaim Property" filed by the Bank of America National Trust and Savings Association, admits, denies and alleges as follows:

I.

Admits as true the allegations contained in Paragraphs I, III, IV, V, VIII and IX.

II.

Respondent admits that at the time of the filing of the petition in bankruptcy, the bankrupt had in his possession certain motor vehicles, more particularly described in columns one and two of Schedule "A" of the petition filed herein, but de-

nies generally and specifically each, every and all of the other allegations contained in Paragraph II of the "Petition to Reclaim Property" herein.

III.

Respondent admits each, every and all of the allegations contained in petitioner's Paragraph VI except that he denies generally and specifically that while the seven (7) motor vehicles mentioned in the said paragraph were in the possession of the bankrupt [26] and the said vehicles were sold and the proceeds of the sale were not delivered or paid over to the petitioner herein and that under certain trust receipts and certificates, the bankrupt did agree to hold the automobiles and the proceeds of sale thereof in trust for your petitioner, and, further, respondent denies that he now holds the proceeds of any such sales in trust for the petitioner or that the balance of the said proceeds due the petitioner from any sale of any motor vehicles is the sum of \$6959.00, or any other sum, or at all.

IV.

Referring to Paragraph VII, trustee admits that E. A. Lynch has been appointed trustee of the said bankrupt estate and that the motor vehicles set forth in Schedule "A" attached to the petitioner's petition herein are in the possession of the trustee, but denies generally and specifically each, every and all of the other allegations contained in the said paragraph.

V.

Petitioner represents that four of the automobiles set forth in the "Petition to Reclaim Property" on file herein are also the subject of a demand made upon the trustee in bankruptcy by Ernest R. Utley on July 23, 1953 as attorney for Motores de Mexicali, which automobiles may be more particularly described as follows:

1951 Buick 48D-2 Dr. Dyno., Motor No. 65129114, License No. 1X32661

1950 Olds. 8 98Dlx 4 Dr. Hydro, Motor No. 8A357041H, License No. 1X32666

1952 Chev. SyDlx 4 Dr., Motor No. KAA49792, License No. 1Y97954

1952 Chev. SyDlx 4 Dr., Motor No. KAA14323, License No. 1Y97952

VI.

Petitioner alleges that as to the said four automobiles, it admittedly has no equity but cannot release the same to the petitioner, Bank of America National Trust & Savings Association, in [27] the face of the adverse claim made thereto by Motores de Mexicali.

Wherefore, your respondent prays:

That petitioner take nothing by reason of the petition herein.

CRAIG, WELLER & LAUGHARN,

/s/ By C. E. H. McDonnell,

Attorney for Respondent. [28]

[Endorsed]: Filed August 13, 1953.

[Title of District Court and Cause.]

STIPULATION

Whereas, Mr. E. A. Lynch, trustee in the above captioned bankruptcy, presently has in his possession a stock of motor vehicles, as assets of the above captioned estate; and

Whereas, Motores de Mexicali, a corporation of the United States of Mexico, by and through its counsel, Ernest R. Utley, has on July 23, 1953 made formal demand upon the trustee and claim to the automobiles set forth in Exhibit "A" attached hereto; and

Whereas, the trustee has in his possession at the present time only those automobiles claimed by the said Motores de Mexicali as are indicated by an asterisk (*) on the attached Exhibit "A"; and

Whereas, the said four automobiles are also claimed by the Bank of America National Trust and Savings Association under and by virtue of trust receipts held by the said Bank of America National Trust and Savings Association; and

Whereas, litigation has heretofore been commenced by and between Motores de Mexicali, Bank of America National Trust and Savings Association and the trustee in bankruptcy to determine title in and to the said automobiles; and

Whereas, it is the desire of Motores de Mexicali and the [29] trustee herein to liquidate all of those cars claimed by the said Motores de Mexicali as soon as possible through the medium of a public

auction sale to be conducted by the trustee personally.

Now, Therefore,

It Is Hereby Stipulated by and between Motores de Mexicali, a corporation of the United States of Mexico, and E. A. Lynch, trustee in bankruptcy for Erbel, Inc., dba Bi Rite Auto Sales, bankrupt, by and through their respective counsel, that the trustee herein may sell and dispose of the cars indicated on the attached Exhibit "A" by an asterisk (*), the trustee to impound the net proceeds of such sales after deducting therefrom any expenses of the conduct of the said sales, said funds to be impounded until a further order of the bankruptcy court be made fixing and determining to whom the said funds belong.

And, It Is Further Stipulated that the rights of Motores de Mexicali will attach to the said proceeds of the sale of the said automobiles in the same manner and to the same extent as the rights of the said Motores de Mexicali, if any, attached to the said automobiles.

Dated: August 12, 1953.

CRAIG, WELLER & LAUGHARN,

/s/ By C. E. H. McDONNELL,

Attorneys for Trustee.

Note: Subject to letter attached.

/s/ ERNEST R. UTLEY,

Attorney for Motores de
Mexicali. [30]

[Endorsed]: Filed August 18, 1953.

[Title of District Court and Cause.]

STIPULATION TO IMPOUND FUNDS AND
RELEASE TITLES PENDING FURTHER
ORDER OF COURT

Whereas, the Bank of America National Trust and Savings Association has heretofore filed on July 29, 1953 a "Petition to Reclaim Property" on which an Order to Show Cause was issued against the above-captioned bankrupt estate on July 29, 1953, and by which the said Bank sought to assert some right, title or interest in and to certain automobiles or the proceeds of the sale thereof; and

Whereas, the Trustee herein filed on August 13, 1953 an "Answer to Order to Show Cause" alleging that the said bank was without rights to the proceeds of the sale of the claimed automobiles, but admitting the interest of the Bank by virtue of certain Trust Receipts held by it; and

Whereas, Motores de Mexicali S.A. filed herein an "Answer, Affirmative Defense and Cross Petition" by which it sought to intervene in the hereinbefore described proceedings and assert what it claimed to be rights superior to either the Bank of America or the bankrupt estate in and to certain automobiles, or the proceeds of their sale; and

Whereas, a hearing was held on the Bank's "Reclamation Petition" and Motores de Mexicali S.A. "Petition to Intervene" on August 13, 1953 [39] at 10:00 a.m., which hearing was continued to

August 19, 1953 at 11:00 a.m., at which time all matters were taken under submission by the Court; and

Whereas, the Trustee has arranged for or otherwise effected sales of certain automobiles, title to which is in dispute in the previously described proceedings; and

Whereas, it is the desire of all parties hereto to permit the Trustee to complete the said sales so long as the proceeds thereof are impounded pending a final disposition of all claims thereto by the Bank of America, Motores de Mexicali S.A. and E. A. Lynch, Trustee.

It Is Hereby Stipulated: by and between the Bank of America National Trust and Savings Association, Motores de Mexicali S.A., and E. A. Lynch, Trustee in Bankruptcy for Erbel Inc., bankrupt, by and through their respective attorneys as follows:

That the Trustee may sell or may complete the sale or otherwise arrange for the sale of the following described automobiles for the indicated realizations:

Description: 1951 Buick; Motor No. 65129114; License No. IX32661; Realization, \$1300.

Description: 1950 Oldsmobile; Motor No. 8A-357041H; License No. IX32666; Realization, \$1250.

Description: 1952 Chevrolet; Motor No. KAA49-792; License No. IY97954; Realization, \$1200.

Description: 1952 Chevrolet; KAA14323; License No. IY97952; Realization, \$1150.

Description: 1948 Cadillac; Motor No. 486238723; License No. IS67865; Realization, \$1672.82.

Description: 1952 Buick; Motor No. 66741345; License No. IY61107; Realization, \$2041.

Description: 1950 Chevrolet; Motor No. HAA-702291; License No. 1Y61111; Realization, \$1341.32.

Description: 1947 Mercury; Motor No. 799A1-626018; Realization, \$400.

And that Bank of America will release to the Trustee any and all documents of title necessary to enable the Trustee to deliver good title to the said automobiles.

II.

That the Trustee will hold and impound the sum of \$10,355.14 subject to a final order of this Court fixing and determining the respective rights of all parties hereto in and to the said fund [40] and/or the automobiles the sale of which produced it.

HUGO A. STEINMEYER,
ROBERT H. FABIAN,
ROBERT VAN BUSKIRK,

/s/ By ROBERT H. FABIAN,
Attorneys for Bank of America.

/s/ ERNEST R. UTLEY,
Attorney for Motores de
Mexicali S.A.

CRAIG, WELLER & LAUGHARN,
/s/ By C. E. H. McDONNELL,
Attorneys for E. A. Lynch,
Trustee. [41]

[Endorsed]: Filed September 2, 1953.

[Title of District Court and Cause.]

MEMORANDUM OPINION RELATIVE TO
TITLE OF CERTAIN MOTOR VEHICLES
OR THEIR PROCEEDS

This is a three-cornered controversy between Bank of America, the Trustee in Bankruptcy, and Motores de Mexicali, S. A., a Mexican corporation, over the title to certain motor vehicles, or the proceeds from the sale thereof.

Craig, Weller & Laugharn, Attorneys for Trustee in Bankruptcy.

Hugo A. Steinmeyer, Robert H. Fabian and Robert van Buskirk, Attorneys for Bank of America National Trust and Savings Association, (hereinafter referred to as the Bank).

Ernest R. Utley, Attorney for Motores de Mexicali, a Mexican corporation, (hereinafter referred to as the Mexican Corporation).

I.

Statement of the Case

This is a voluntary bankruptcy proceeding commenced July 2, 1953. At that time an adjudication was had and the case was referred to Referee in Bankruptcy Hugh L. Dickson for [42] administration. He has requested the undersigned Referee in Bankruptcy to handle this particular controversy. (Bankruptcy Rule 209a, SD Cal.) On July 28, 1953, E. A. Lynch was appointed and qualified as Trustee in Bankruptcy.

On July 29, 1953 the Bank filed a petition to

reclaim from the bankrupt estate certain motor vehicles, or in lieu thereof, the Trustee in Bankruptcy be authorized and directed to sell the same and out of the proceeds of the sale pay over to the Bank \$6,959.00. On August 13, 1953, the Trustee in Bankruptcy filed an answer to the said petition, wherein he put in issue most of the material allegations of the petition, and also alleged that four of the motor vehicles involved were claimed by the Mexican corporation. On August 13, 1953, said Mexican corporation served and filed its notice of motion for leave to file on its behalf an answer, affirmative defense and cross petition with respect to said four motor vehicles and one more. On that date, without objection, said motion was heard and granted. In the said pleading the said Mexican corporation prayed that it be declared the owner of and entitled to the immediate possession of the motor vehicles therein specified (the five cars above mentioned) and that the Bank had no lien or claim thereon whatever; and that in the event the Trustee could not deliver said motor vehicles to said Mexican corporation in their original form, but was in a position to deliver the same in a modified form, that the Trustee be required so to do.

On August 18, 1953, a stipulation was entered into between the Trustee in Bankruptcy, the Bank and said Mexican corporation, whereby the Trustee was empowered to sell certain cars therein specified, and impound the net proceeds of the sales, after deducting therefrom the expenses of the sales, such impounding to continue until the Bankruptcy

Court determined to [43] whom the said funds belong; all the rights of the said Mexican corporation to attach to the proceeds of the said sales in the same manner and to the same extent as such rights attached to the said motor vehicles themselves. This stipulation included four of the cars claimed by the Mexican corporation, and other cars, upon all of which the Bank held trust receipts.

On August 26, 1953 the Trustee filed a statement of the disposition of certain motor vehicles, including four of the cars claimed by the Mexican corporation, and six others, upon all of which the Bank held trust receipts. A list of the prices received for the same was attached, together with a list of certain motor vehicles abandoned to the Bank as being without any equity therein for the bankrupt estate.

On September 2, 1953 the three parties involved filed herein a stipulation for the Trustee to sell certain cars upon all of which the Bank held trust receipts, including one car claimed by the Mexican corporation, and to impound the funds derived therefrom, and release title, pending the further order of the Court.

A hearing of this controversy was held before the undersigned Referee in Bankruptcy on August 13, 1953. The reporter's transcript of the proceeding was filed August 19, 1953.

II.

Statement of the Evidence

Over a period of months the bankrupt corpora-

tion borrowed money from the Bank, which borrowings were secured by trust receipts on motor vehicles executed and delivered by the bankrupt to the Wilshire-LaBrea Los Angeles branch of the Bank, through the medium of its assistant cashier. The Bank complied with the requirements of Secs. 3016, et seq. of the California Civil Code, with respect to these trust receipts. [44] All the vehicles in which the three parties here claim an interest have been sold, except certain cars abandoned to the Bank as burdensome. The money realized therefrom has been impounded to await the decision of the Court. The Trustee has paid off to the Bank a number of trust receipts upon cars not in controversy here.

The Mexican corporation sold and delivered to the bankrupt five cars, hereinafter more particularly described, upon receiving from it certain documents, all of which were in the same form. Each was entitled: "Automobile Purchase Draft," was signed by the bankrupt, and recited that upon presentation of the draft to the Wilshire-LaBrea Los Angeles branch of the bank for collection, together with the title documents, the Bank would pay to the Mexican corporation the amount of the draft. The title documents did not accompany the drafts, but were delivered by the Mexican corporation to the bankrupt at the same time it executed and delivered the drafts. These parties had previously handled similar transactions in a similar manner. Two of the drafts were dated March 6, 1953, and three April 2, 1953. The two drafts dated

March 6, 1953 were returned unpaid to the Mexican corporation's bank on March 18, 1953. These drafts were sent back by the Mexican corporation's bank for collection on March 28, 1953, and then returned to such bank unpaid on May 19, 1953. The two drafts dated April 2, 1953 were forwarded for collection by the Mexican corporation's bank on April 6, 1953. These drafts were returned unpaid on May 19, 1953, to the said Bank. The assistant cashier of the branch bank, who handled the trust receipts had actual knowledge on May 19, 1953, that these drafts had not been honored.

The Bank advanced money on trust receipts on the cars covered by the drafts, and which cars are now claimed by the [45] Mexican corporation, as follows: April 6, 1953, 1951 Buick, Engine No. 65129114, \$1200.00; April 8, 1953, 1950 Oldsmobile, Engine No. 8A357041H \$1137.00; May 9, 1953, 1952 Buick, Engine No. 66741345, \$1612.00; May 19, 1953, 1952 Chevrolet, Engine No. KAA49792, \$1068.00 and 1952 Chevrolet, Engine No. KAA-14323, \$1068.00. The Trustee, by stipulation, sold these cars and received the following gross prices: 1951 Buick, Engine No. 65129114, \$1200.00; 1950 Oldsmobile, Engine No. 8A357041H, \$1250.00; 1952 Buick, Engine No. 66741345, \$2041.00; 1952 Chevrolet, Engine No. KAA49792, \$1200.00; and 1952 Chevrolet Engine No. KAA14323, \$1150.00, or a total of \$6841.00. The Bank claims a balance of principal of \$2410.00 due on trust receipts upon not only the 1952 Buick, Engine No. 66741345 which the Trustee sold for \$2041.00 as above stated,

but also upon a 1950 Chevrolet, Engine No. HAA-702291, which the Trustee sold for \$1341.32, and a 1947 Mercury, Engine No. 799A1626018, which the Trustee sold for \$400.00.

The Mexican corporation knew that the purpose of delivering title before the drafts were paid was to enable the bankrupt to have the cars "floored" by the Bank, and trust receipts issued by it in consideration of cash advances to be made to the bankrupt so it could pay off the drafts. The bankrupt represented at that time to the Mexican corporation that the drafts would be paid promptly, the same as a check. These bank drafts were not honored, and the purchase price was never paid. No notice of rescission was ever given by the Mexican corporation to the bankrupt at any time prior to bankruptcy.

The Sheriff of Los Angeles County sold a 1948 Cadillac for \$1672.82, which money was paid into the estate and is still there. The Bank claims a balance of principal on its trust receipt on this car in the amount of \$1614.00.

It was stipulated by all parties that the Trustee should [46] deduct from all sales prices the reasonable expenses of the sales.

Certain conversations between representatives of the bankrupt and of the Mexican corporation were admitted into evidence, subject to the Bank's motion to strike out such evidence as irrelevant.

III.

Questions Presented

1. Did title to the five cars claimed by the Mexican corporation pass from it to the bankrupt; and if it did, was it necessary for the Mexican corporation to rescind in some manner in order to have such title set aside?

2. Even if title did not pass, did the Mexican corporation clothe the bankrupt with such indicia of title and possession as to protect the Bank in its issuance of trust receipts, if it be shown that the Bank was a bona fide encumbrancer for value without notice?

3. Is knowledge of an employee of the Bank, not an officer, and not communicated to an officer of the Bank, binding upon the Bank?

4. Did the Bank trace funds into the hands of the Trustee which were proceeds of the sale by the Sheriff of a Cadillac car upon which the Bank held a trust receipt?

5. Were conversations between representatives of the Mexican corporation and the bankrupt relevant where they were not heard by or communicated to any representative of the Bank?

IV.

Comment on the Law

1. In View of All the Circumstances, Title Did Not Pass From the Mexican Corporation to the Bankrupt.

The Mexican corporation claims only the proceeds (less expenses) of the five cars above men-

tioned, viz., 1951 Buick, [47] 1950 Oldsmobile, two 1950 Chevrolets and a 1952 Buick. The total gross proceeds of the sales was \$6841.00.

The evidence indicates that the Mexican corporation and the bankrupt contemplated a sale for cash. It is true that no checks were given, but the drafts given were intended to be of a similar nature. The bankrupt represented and the Mexican corporation understood that the drafts would be paid upon their presentation to the Bank.

The California law seems clear that where the terms of sale are cash, the title to the goods does not pass until payment of the price. *Puritas Coffee & Tea vs. De Martini*, 56 C.A. 528, 206 P. 98. And where a check is given upon delivery, the sale is one for cash, and if the check is dishonored the title to the goods, as between the parties remains in the seller. *South San Francisco Packing and Provision vs. Jacobsen*, 183 C. 131, 190 P. 628; *Peerless Motor Co. vs. Sterling Finance*, 139 C.A. 621, 34 P.(2) 738; *Clark vs. Hamilton Diamond*, 209 C.1, 284 P. 915. See to the same effect: *DeVries vs. Ellison*, DC Minn. 100 F.S. 781 affirmed CCA 8 199 F.(2) 677, (Iowa and Minnesota law); *Engstrom vs. Benzel*, CCA 9, 191 F.(2) 689, (Washington law); *Johnson vs. Robinson*, CCA 5, 203 F.(2) 135 (Texas and Oklahoma law). Where cattle are sold for cash and a draft is given for the purchase price, but the draft is dishonored, title as between the parties to the sale remains in the seller. *Towey vs. Esser*, 133 C.A. 669, 24 P.(2) 853. We are not dealing here with a situation where a check

or draft is given in absolute payment *Peerless Motor vs. Sterling Finance*, 139 C.A. 621, 34 P.(2) 738, in which event title passes even if the check or draft is not honored.

But we have a bothersome question and that is what effect does California Civil Code, Sec. 1781 (2) have on the situation here. That section provides that a transfer of title [48] shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by overt act an intention to rescind. These draft transactions occurred in March and April of 1953. The bankruptcy commenced July 2, 1953. No notice of rescission was ever given by the Mexican corporation, nor did it do anything to indicate such an intention, at least until after the date of bankruptcy. Promptness is required in rescission. California Civil Code Sec. 1691 (1). Here the Mexican corporation did nothing for some months before bankruptcy after they were notified that the drafts would not be paid; but the time involved was not long before the date of bankruptcy, and so lack of actual rescission on the part of the Mexican corporation may be condoned, if such rescission was necessary.

2. Even Though Title Did Not Pass, the Mexican Corporation Clothed the Bankrupt With Such Indicia of Title and With Such Possession as to Estop the Mexican Corporation From Questioning the Title of the Innocent Bank.

The law is clear in California that where an owner of property clothes another with apparent

title to, or power of disposition over it, and an innocent third party is thereby induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterwards asserting his title. *Fowler vs. Nat'l Bank of California*, 167 C. 653, 140 P. 271; *Butler vs. Woodburn*, 19 C.(2) 425, 122 P.(2) 17; *Western States Acceptance vs. Bank of Italy*, 104 C.A. 19, 285 P. 340; *Conklin vs. Benson*, 159 C. 786; 116 P. 34; *Phelps vs. American Mortgage Co.* 40 C.A.(2) 361; 104 P.(2) 880; *Sidney vs. Wilson*, 67 C.A. 283, 227 P. 672. See also in other jurisdiction, *Syrolshka vs. Pleniozek*, 63 N.E.(2) 675, 327 Ill. App. 218; *Sullivan vs. Wells*, D. Neb. 89 F.S. 317; *J. L. McClure Motor Co. vs. McClain* (Ala) 42 S.(2) 266; *Plummer vs. Kingsley* [49] (Ore) 226 P.(2) 296; *Wren vs. Bankers' Investment* (Ore) 249 P.(2) 716. Sec. 3543 of the California Civil Code provides that where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer. It is stated in the case of *Collins vs. O'Connell*, CCA 9 136 F.(2) 141, that this rule is based upon the principle of "equitable estoppel."

The situation here is that both the Mexican corporation and the Bank were innocent parties. The third and guilty party was the bankrupt. A mere failure to perform an agreement or to keep a promise, is not fraud. *Brison vs. Brison*, 75 C 525, 17 P 689; *Maynes vs. Angeles Mesa Land*, 10 C.(2) 587, 76 P.(2) 109; *Rheingans vs. Smith*, 161 C 362, 119 P 494. While a promise made without any intention of performing it is fraudulent (*Hayes vs.*

Glouster, 88 C 560, 26 P 367; Cutler vs. Bowen 10 C.(2) 31, 51 P.(2) 164); there is no evidence here that the bankrupt had any such intention. No evidence was presented to show that the Bank knew or had cause to believe that the sale was to be a cash transaction, or that the bankrupt represented to the Mexican corporation that the drafts would be honored when presented. The mere fact that drafts were not honored was not sufficient to put the Bank on notice that there might be some fraud on the part of the bankrupt in the transactions. The bank acted in good faith in issuing the trust receipts, relying upon the indicia of title to the cars furnished by the Mexican corporation to the bankrupt, and delivered by the latter to the Bank. Furthermore, the Mexican corporation knew that the bankrupt proposed to use the muniments of title given to it for the purpose of enabling it to borrow money from the bank to pay off the Mexican corporation, through the flooring of the cars by trust receipts. Under this circumstance alone, it hardly lies in the mouth of the Mexican corporation to assert that the Bank, and [50] not it, should be the one to suffer by the default of the bankrupt. Bankruptcy courts operate on equitable principles. (Stegman vs. Knudsen, CCA 9, 152, F.(2) 871; in re Los Angeles Lumber Co. SD Cal., 46 F.S. 77; in re Loose SD Cal., 52 F.S. 20, 54 ABR NS 786; in re Setzler, SD Cal., 73 F.S. 314). It is difficult to conceive that a court of equity would approve the stand taken by the Mexican corporation. It was negligent in several particulars. It could

have protected itself by (1) first securing a certified check or a cashier's check or (2) by sending the muniments of title along with the drafts to the bank, when by doing so the bank would have been bound not to issue, except at its peril, trust receipts until the drafts were paid.

Mere possession of the cars by the bankrupt would not have been sufficient to protect the bank in going ahead and issuing trust receipts thereon (Martin vs. Hollins, 118 C.A. 561, 5 P.(2) 899), but, since the bankrupt not only had possession but also the title papers to the cars, and the title papers were not attached to the drafts, the Bank was justified in assuming that the transactions between the Mexican corporation and the bankrupt were sales on credit and not sales for cash. An illustrative case of a sale for cash is that of Alonso vs. Badger, 58 C.A.(2) 752, 138 P.(2) 24. There the cash sale transaction was that title to lambs would pass under a bill of sale attached to a draft drawn by a livestock dealer upon a livestock commission broker; and when the broker refused to honor the draft no sale resulted. Another example of a cash sale is that where goods are shipped on a bill of lading, with a draft attached. 77 CJS 1075. Similar circumstances did not exist here.

It appears that a clear case of "equitable estoppel" is here presented. [51]

3. Knowledge of an Employee of the Bank, Not an Officer or a Manager of a Branch, Not Communicated to Some Officer or Manager, Does Not Bind the Bank.

It is contended by the Mexican corporation that the knowledge of the Assistant Cashier of the branch Bank, who handled the trust receipts, that the drafts were not paid, was sufficient notice to the Bank not to issue the trust receipts except at its peril. The general rule appears to be that the knowledge of an officer of a bank within the scope of his duties is imputable to the corporation. *Sanders vs. Magill* 9 C.(2) 145, 70 P.(2) 159; *Vanciel vs. Kumle*, 26 C.(2) 732, 160 P.(2) 802; *Bank of Mountain View vs. Winebrenner* (Mo.App.) 189 S.W.(2) 429, *aff'd* 195 S.W.(2) 486. The cases include in the term "officer" not only the president and vice-presidents but also the cashier, an assistant cashier and a branch bank manager. *Christie vs. Sherwood*, 113 C. 526, 45 P 820; *First Nat'l vs. Reed*, 198 C. 252, 244 P. 368; *Williams vs. Hasagen*, 166 C. 386, 137 P. 9; *Vanciel vs. Kumle*, 26 C.(2) 732, 160 P.(2) 602; *ex parte State* 77 So. 353, 201 Ala. 59, *rev'g Kramer vs. State* 75 So. 185, 16 Ala.App. 40; *Cox vs. First Nat'l*, 10 C.A.(2) 302, 52 P.(2) 524. But this does not apply to employees of a bank who are not officers or do not occupy a managerial capacity. (*Globe Indemnity vs. Union and Planters' Bank & Trust* CCA 6, 27 F.(2) 496; *State vs. Brown County Bank*, 200 N.W. 866, 112 Neb. 642); *Hartford vs. All Night and Day Bank*, 170 C. 540, 150 P. 536), except under unusual circumstances as in the case of *San Mateo County Bank vs. Dupret*, 124 C.A. 395, 12 P.(2) 669, where an agent of the bank bid in certain property at a tax sale.

But in our case here, as we have discussed in No. (2) above, the Bank or its said assistant cashier had no reason when the trust receipts were issued, to assume or believe that [52] the transactions between the Mexican corporation and the bankrupt were cash sales, or were other than sales on credit. This appeared from the nature of the papers submitted to the Bank and the manner in which they were submitted.

4. The Bank Traced Into the Hands of the Trustee Funds Derived from the Sale of a Car Upon Which it Had Issued Unpaid Trust Receipts.

In order to reclaim trust funds or property from a bankrupt estate, these must be traced into the estate in their original or substituted form; and they must be on hand and not dissipated; In re Acheson CCA 9, 22 ABR 338, 170 F. 427; City of Dallas vs. Crippen, CCA 5, 171 F.(2) 526; American Service vs. Henderson, CCA 4, 46 ABR NS 408, 120 F.(2) 525. The Bank clearly traced into the hands of the Trustee the proceeds, viz., \$1672.82, of a sale of a Cadillac car under legal process; and the said fund is still in the hands of the Trustee and has not been dissipated. Upon this car the Bank held a trust receipt, the balance of principal due thereon being \$1614.00.

5. Conversations Between the Mexican Corporation and the Bankrupt Were Not Relevant Where They Were Not Heard by or Communicated to Any Representative of the Bank.

These conversations were not heard by any representative of the Bank, nor was their substance

ever communicated to the Bank. Under these circumstances, it appears elemental that what was said in such conversations was irrelevant and could not in any manner bind the bank. "Things done between strangers ought not to injure those who are not parties to them". This doctrine is referred to as "res inter alios acta" or "res inter alios acta alteri nocere non debet." Chapman vs. Metropolitan Life 173 S.E. 801, 807, 172 S.C. 250; Nicholas vs. Granite State Fire 24 S.E.(2) 280, 284, 125 W. Va. 349; Carroll vs. Rye Township, 101 N.W. 894, 897, 13 N.D. 458. [53]

V.

Conclusion

The judgment must be as follows:

1. The claims of the Mexican corporation must be denied.

2. The Bank will be entitled to recover from the Trustee as proceeds of sales by him (less reasonable expenses of sales, the amount thereof to be agreed upon between the Mexican corporation, the Trustee and the Bank, or, if they fail to agree to be settled by the Referee after hearing upon due notice), the sum of \$8497.00, derived as follows: 1951 Buick, Engine No. 65129114, \$1200.00; 1950 Oldsmobile, Engine No. 8A357041H, \$1137.00; 1952 Chevrolet, Engine No. KAA14343, \$1068.00, 1952 Chevrolet, Engine No. KAA49792, \$1068.00; 1952 Buick, Engine No. 66741345, 1950 Chevrolet, Engine No. HAA-702291, 1947 Mercury, Engine No. 799A1626018 - \$2410.00, or a total of \$6883.00. The Sheriff of Los

Angeles County sold for \$1672.82 a 1948 Cadillac, Engine No. 486328723 upon which the Bank holds a trust receipt, the balance due being \$1614.00. This makes a total to be paid by the Trustee to the Bank of \$8497.00.

3. The Mexican corporation is entitled to be paid by the Trustee any surplus over and above the amount received from the sale of the five cars in which it is interested after deduction of the expenses of sale and the amount due the Bank.

4. The motion to strike out the testimony of representatives of the bankrupt and the Mexican corporation, to which the Bank was not a party, must be granted. The Bank cannot be awarded interest on its trust receipts after the date of bankruptcy. As stated in *Beecher vs. Leavenworth State Bank* CCA 9, 192 F.(2) 10, it is a general rule that interest stops on secured claims at the date of bankruptcy. The only exceptions to the rule are (1) where the estate is fully solvent; and (2) where the securities pledged to the secured creditor [54] yield income. The facts in this case do not fit either of these exceptions.

Counsel for the Bank will, pursuant to Gen. R. No. 7 of this Court, prepare, serve and file appropriate findings of fact, conclusions of law and order.

Dated: November 19, 1953.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy. [55]

[Endorsed]: Filed November 19, 1953.

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW OF-
FERED BY THE BANK OF AMERICA
NATIONAL TRUST & SAVINGS ASSO-
CIATION

Comes now Motores de Mexicali, S. A., hereinafter called "Motores", and objects to the proposed findings of fact and conclusions of law offered by the Bank of America National Trust and Savings Association, hereinafter called the "Bank", and in addition to said objections, Motores proposes its own findings of fact and conclusions of law and order. That in presenting said findings of fact and conclusions of law, it will be understood that Motores does not agree with the adverse findings and conclusions reached by this Honorable Court in its memorandum opinion, but Motores nevertheless has endeavored to prepare findings of fact and conclusions of law consistent with the Court's memorandum opinion, and has endeavored to eliminate matters found in the proposed findings of the Bank which are not supported by the evidence or called for in the Court's memorandum opinion.

I.

Objects to the following language in paragraph number 8 of the Bank's proposed findings, to-wit: "as trustee for the bank pursuant to said trust receipts." (See page 4, lines 15-16 of said [56] find-

ings.) as a conclusion of law and not a finding of fact.

II.

Objects to the Bank's proposed finding number 9, for the reason that it fails to show, as found by the Court, that these automobiles were sold for cash and delivered and that the sale was a conditional sale under Section 1762 C. C. The delivery of the cars and the muniments of title and the payment of the drafts were concurrent conditions. The Bank's proposed findings further state that the drafts were "non-negotiable drafts drawn upon itself" etc. The Court, in its memorandum opinion, (page 4, line 10) refers to these drafts as "automobile purchase drafts" and these exact words are printed on the drafts, and we have referred to them in our proposed findings by that name. We have also, in our proposed findings, referred to the drafts by exhibit number, rather than attempting to reach a legal conclusion as the Bank has done in referring to them as "non-negotiable". This language again is clearly a legal conclusion and has no place in a finding of fact.

III.

Objects to the Bank's finding number 10 for the reason that it is neither supported by the evidence nor called for in the Court's opinion. Mr. Luken testified at page 68, lines 4-9, Reporter's Transcript:

"He told us they needed the titles in order to bring the cars across the border, bring them into

California, and then take those papers into the Highway Patrol or the Registration Department here and get the pink slip, and with the pink slip they can floor the cars with the bank and pay the drafts immediately upon presentation to the bank."

See also his testimony at page 68, lines 21 to 23:

"No, sir, because that is one thing I explained to him very clearly. We wouldn't give the titles unless we get the money." [57]

This is supported by the testimony of Mr. Resnick and is not disputed. (See page 61, lines 16-17 Reporter's Transcript.)

In other words, as found by the Court, this was intended to be and was a cash sale; the draft was the same as a check. Motores, therefore, conditionally, delivered both the automobiles and the muniments of title thereto so that:

1st. The bankrupt could bring the automobiles across the International Border and into California.

2nd. The bankrupt could secure California registration, and with the California registration, the cars could be floored with the Bank and the bankrupt could "pay the drafts immediately upon presentation to the bank." As above indicated, Mr. Luken said: "We wouldn't give the titles unless we get the money." Therefore, Motores' delivery of the cars and muniments of title was conditional upon its getting the money. In other words, a cash sale, and in a cash sale you usually deliver to the buyer the property he purchases.

Finding number 10 is cleverly worded so as to leave out some of the most essential facts under the evidence. The advances of funds referred to in this finding were, according to the undisputed evidence, for one purpose only and that was to pay the drafts promptly, which fact the Bank has cleverly left out of its finding as well as the other important facts hereinabove referred to.

IV.

Objects to Bank's finding number 11 on the same ground as the last objection. Again the finding eliminates the purpose for the flooring of the automobiles, to-wit: to pay the drafts promptly, and the delivery of the cars and muniments of title thereto were conditional upon this very fact.

Objects to the finding of good faith upon the part of the Bank. We respectfully urge that the Bank had knowledge that [58] these very automobiles upon which it was lending money had not been paid for, and that Motores was an unpaid seller. This, together with the fact that the drafts indicated that title to the cars would accompany the drafts certainly put the Bank upon inquiry. To make our point a bit plainer—suppose Resnick had stolen these muniments of title, and he, in fact, did because he obtained them under false representations, and that constituted larceny by trick and device. Under such circumstances, could it be said that the Bank acted in good faith and was not put upon inquiry?

V.

Objects to finding number 12. It is not supported by the facts. Without unduly prolonging our objection, what we hereinabove stated applies with equal force here. It leaves the impression that Motores accepted the last three drafts after the first two, to its knowledge, had been dishonored, while the undisputed testimony is to the contrary.

We also respectfully submit that the evidence will not support a finding that the bank had "no knowledge" that the sale was for cash. It most certainly had some knowledge, even though it might be contended this knowledge was insufficient.

VI.

Objects to finding number 13. Here again the Bank cleverly leaves out important findings such as "immediately" before the words "upon presentation" at page 6, line 28.

Furthermore, to find that the bankrupt intended to fulfill its promise referred to in this finding is utterly ridiculous. Resnick, himself, testified that he was to floor the cars "so I could pay for them." This is in harmony with Luken's testimony above quoted. The fact remained that he floored the cars, he got the money and he didn't pay for them. And, he got the money from the bank on these very cars while these drafts were in the possession of the bank. In fact, the money was borrowed on the [59] two Chevrolets the same day the drafts were returned dishonored. Yet, in the light of these undisputed facts, the Bank would urge upon this

Court a finding that the bankrupt intended to fulfill its promise. Intent is determined from the acts and conduct of the person affected. Resnick's acts and conduct show a deliberate intent to defraud and to take something which did not rightfully belong to him or his company.

VII.

Objection is made to the Bank's findings numbers 14 and 15 based upon the same general reason which we have heretofore urged.

VIII.

Objection is made to finding number 16 for the reason that it is in direct conflict with both the evidence and the Court's opinion. The assistant cashier, Mr. Fort, who loaned the bankrupt money upon these trust receipts testified that he knew the drafts were unpaid on May 19, 1953 (Reporter's Transcript, pages 44-45) and on that day he loaned the bankrupt money upon the two Chevrolets, and the bankrupt was not credited therewith until the 21st. This should be sufficient to show the impropriety of this finding.

VIII.

Objects to the Bank's finding number 17. This finding begins with a favorable finding for Motores, but under this sugar coating is an abundance of poison. We are perfectly content to let the drafts speak for themselves rather than take the Bank's legal conclusion of what they say. Again in this finding, there is an attempt to purify the corrupt

acts and conduct of the bankrupt, wholly unsupported by the evidence.

IX.

Objects to the conclusion of law in paragraph 6 of the Bank's proposed conclusions of law for the reason and upon [60] the ground that the Trustee in Bankruptcy is bound by the testimony referred to in conclusion number 6, irrespective of whether the Bank may be bound thereby.

Respectfully submitted,

JOHN L. MACE and

ERNEST R. UTLEY,

/s/ By ERNEST R. UTLEY,

Attorney for Motores de

Mexicali, S. A. [61]

[Endorsed]: Filed January 14, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The above-entitled matter came on regularly for hearing on August 13, 1953, at 2:00 p.m. before the Honorable Reuben G. Hunt, Referee in Bankruptcy, upon the petition of Bank of America National Trust and Savings Association to reclaim certain motor vehicles and monies from the Trustee in Bankruptcy, the Trustee's answer to said petition, and the answer, affirmative defense and cross-petition of Motores de Mexicali, S. A. The petitioner Bank of America National Trust and Sav-

ings Association, hereinafter called the Bank, appeared by its attorneys Hugo A. Steinmeyer, Robert H. Fabian and Robert Van Buskirk, appearing by Robert H. Fabian; E. A. Lynch, Trustee in Bankruptcy, appeared by his attorneys Craig, Weller & Laugharn, appearing by C. E. H. McDonnell; and cross-petitioner Motores de Mexicali, S. A. appeared by its attorneys Ernest R. Utley and John L. Mace, appearing by Ernest R. Utley. The matter came on for hearing on August 13, 1953, at 2:00 p.m. and [62] at 4:30 p.m. of said day the matter was continued to August 19, 1953, at 11:00 a.m. Oral and documentary evidence was offered by the parties and at the close of the testimony the Court ordered a transcript made and ordered the parties to submit written arguments in support of their respective positions. The cause was ordered submitted upon the filing of the last brief. The Referee, being fully advised, has heretofore made and filed on November 19, 1953, a memorandum opinion relative to title to the motor vehicles and their proceeds involved.

Now, Therefore, the Referee does hereby make the following

Findings of Fact

1. The voluntary petition in bankruptcy was filed by Erbel, Inc., doing business as Bi-Rite Auto Sales, on July 2, 1953, and on July 28, 1953, E. A. Lynch was appointed and qualified as Trustee in Bankruptcy of said Erbel, Inc.

2. On April 6, 1953, the bankrupt executed and

delivered to the Bank a trust receipt describing, among other vehicles, a 1951 Buick, Engine No. 65129114; in reliance upon said trust receipt the Bank advanced to the bankrupt the sum of \$5,755.00; that of said sum there remains a balance due the Bank on said trust receipt of \$1,200.00; that said vehicle was sold by the Trustee on or about August 14, 1953, for the sum of \$1,300.00; that said sum is now in possession of the Trustee, and constitutes the proceeds of said vehicle.

3. That on or about April 8, 1953, the bankrupt executed and delivered to the Bank a trust receipt describing, among other vehicles, a 1950 Oldsmobile, Engine No. 8A357041H; in reliance upon said trust receipt the Bank advanced to the bankrupt the sum of \$1,137.00; that no part of said sum has been paid to the Bank and there remains due the Bank the sum of [63] \$1,137.00; that said vehicle was sold by the Trustee on or about August 14, 1953, for the sum of \$1,250.00; that said sum is now in possession of the Trustee, and constitutes the proceeds of said vehicle.

4. That on or about May 9, 1953, the bankrupt executed and delivered to the Bank a trust receipt describing, among other vehicles, the following: a 1952 Buick, Engine No. 6674135, and a 1950 Chevrolet, Engine No. HAA702291; in reliance upon said trust receipt the Bank advanced to the bankrupt the sum of \$2,410.00; that no part of said sum has been paid to the Bank and there remains due the Bank the sum of \$2,410.00; that

the aforesaid 1952 Buick was sold to one Mays and the Trustee has realized from the sale of said Buick cash in the sum of \$2,041.00; that said Mays traded in on said 1952 Buick a 1947 Mercury, Engine No. 799A1626018; that said 1947 Mercury was sold by the Trustee for a cash realization of \$400.00; that the aforesaid 1950 Chevrolet was sold to one Barbara Cohen and the Trustee has realized from said sale the sum of \$1,341.32; that said sums aggregating \$3,782.32 are now in the possession of the Trustee, and constitute the proceeds of said vehicles.

5. That on or about May 19, 1953, the bankrupt executed and delivered to the Bank a trust receipt describing among other vehicles, a 1952 Chevrolet, Engine No. KAA49792 and a 1952 Chevrolet, Engine No. KAA14323; in reliance upon said trust receipt the Bank advanced to the bankrupt the sum of \$4,925.00; that of said sum there remains a balance due the Bank of \$2,136.00; that the vehicles were sold by the Trustee on August 14, 1953, for the sum of \$1,200.00 for the vehicle bearing Engine No. KAA49792, and \$1,150.00 for the vehicle bearing Engine No. KAA14323; that said sums aggregating [64] \$2,350.00 are now in possession of the Trustee, and constitute the proceeds of said vehicles.

6. That the Bank filed with the Secretary of State a statement of trust receipt financing on November 21, 1952.

7. That the bankrupt executed and delivered

to the Bank a trust receipt describing, among other vehicles, a 1948 Cadillac, Engine No. 486238723; that said vehicle was sold prior to bankruptcy by the representative of the Sheriff of Los Angeles County; that the proceeds of the sale of said vehicle in the sum of \$1,672.82 were paid to and are in the hands of the Trustee; that there is due and unpaid to the Bank upon said trust receipt the sum of \$1,614.00.

8. That from and after the execution of the trust receipts, possession of the vehicles described in Findings 2, 3, 4, 5 and 7 was held by the bankrupt pursuant to said trust receipts.

9. That Motores de Mexicali, S. A., hereinafter in these findings called Motores, delivered physical possession of the following-described vehicles to the bankrupt on or about the following dates:

1951 Buick, Engine No. 65129114, March 6,
1953

1950 Oldsmobile, Engine No. 8A357041H,
March 6, 1953

1952 Buick, Engine No. 6674135, April 2, 1953

1952 Chevrolet, Engine No. KAA49792, April 2,
1953

1952 Chevrolet, Engine No. KAA14323, April 2,
1953;

that at the same time possession of the aforesaid vehicles was delivered, Motores delivered to the bankrupt the Mexican registration papers and bills of sale pertaining thereto; that at the same time

possession was delivered, the bankrupt delivered to Motores drafts which did not contain the words "or order" drawn upon itself payable through Bank of America National Trust and Savings Association for the [65] purchase price of each of the vehicles.

10. That the purpose of Motores in delivering the Mexican registration papers and the bills of sale to the bankrupt simultaneously with the delivery of physical possession of the vehicles as specified in Finding 9 was to enable the bankrupt to include the vehicles in trust receipts to be issued to a financial institution in order to obtain advances of funds of loans upon the security of said trust receipts; that Motores knew at the time of delivery of the vehicles that the bankrupt contemplated executing trust receipts on said vehicles for the purpose of creating liens thereon; that Motores consented to the creation of such liens.

11. That the bankrupt, with the full knowledge and consent of Motores, used the aforesaid Mexican registration papers and bills of sale to obtain ownership certificates issued by the Department of Motor Vehicles of the State of California pertaining to each of said vehicles; that on or about the dates specified in Findings 2, 3, 4 and 5 the bankrupt delivered said California ownership certificates to the Bank simultaneously with its application for loans upon each of the vehicles and simultaneously with the execution of trust receipts describing said vehicles; that both Motores and the

bankrupt contemplated that California ownership certificates would be obtained and used for this purpose at the time the vehicles, the Mexican registration papers, and the bills of sale pertaining thereto were delivered by Motores to the bankrupt; that the Bank of America National Trust and Savings Association advanced monies to the bankrupt as set forth in Findings 2, 3, 4 and 5 in good faith in reliance upon the possession by the bankrupt of the vehicles and the possession by the bankrupt of the California ownership certificates showing title registered in the name of [66] the bankrupt; that the bankrupt could not have obtained the aforesaid California ownership certificates without delivering to the Department of Motor Vehicles the indicia of ownership delivered to the bankrupt by Motores.

12. That the Bank had no knowledge that Motores and the bankrupt intended the sales of the vehicles to be cash sales; that the Bank had no knowledge that the bankrupt made any representations to Motores that the drafts would be honored when presented; that the two drafts dated March 6, 1953, given by the bankrupt to Motores at the time the vehicles described in Findings 2 and 3 were delivered were dishonored by the bankrupt on March 18, 1953, and were returned unpaid to Motores' bank in Mexico on that date; that the aforesaid drafts were again forwarded for collection by Motores' bank to the Bank of America National Trust and Savings Association on March 28, 1953, and after being again dishonored were

returned to Motores' bank on May 19, 1953; that after the aforesaid two drafts had been returned to Motores' bank dishonored as aforesaid, Motores on April 2, 1953, delivered the 1952 Buick described in Finding 4 and the two 1952 Chevrolets described in Finding 5 to the bankrupt, taking, in return for the delivery of the vehicles and the title documents pertaining thereto, drafts similar in form to the aforesaid drafts dated March 6, 1953; that the three drafts pertaining to the latter three vehicles were forwarded for collection by the Mexican corporation's bank on April 6, 1953, and were returned unpaid to said bank on May 19, 1953.

13. That the bankrupt at the time it issued the **drafts** promised Motores that it would pay the drafts immediately upon presentment; the bankrupt intended to fulfill this promise at the time it was made; Motores relied upon this promise in parting with its title to the vehicles; the Bank had no knowledge of [67] this promise at any time.

14. Motores did not act with that degree of care reasonably to be expected of a seller of motor vehicles in the same or similar circumstances in that

(1) Motores failed, if it intended to sell only for cash, to obtain from the bankrupt cash or a certified or Cashier's Check;

(2) Motores failed to retain possession of the Mexican registration papers and the bills of sale until the drafts were honored; and

(3) Motores failed to attach to or enclose the

aforesaid Mexican registration papers and bills of sale as indicia of ownership with the drafts but instead delivered said indicia of ownership direct to the bankrupt, and forwarded the drafts with blank pieces of paper enclosed.

15. Since the bankrupt had possession of the vehicles and the indicia of ownership thereto, the Bank, if it had investigated, would be reasonably justified in concluding that the bankrupt had sufficient title to enable it to give a first lien upon the vehicles and that the bankrupt's title to the vehicles was not dependent upon the payment of the drafts; the Bank had no reason to believe and was not in the possession of any facts indicating that Motores and the bankrupt intended the sales to be sales for cash.

16. Prior to May 19, 1953, the officer of the Bank in charge of making the advances described in Findings 2, 3, 4 and 5 had no actual knowledge that the drafts given by the bankrupt to Motores were unpaid at the time the advances were made; upon the facts within the knowledge of the Bank at the time the aforesaid advances were made the Bank was justified in proceeding upon the basis that title had passed to the bankrupt and that Motores extended [68] credit to the bankrupt for the amount of the purchase price.

17. As between Motores and the bankrupt it was intended that the sales be sales for cash; Motores sold and delivered the vehicles and the title documents pertaining thereto to the bankrupt in

return for drafts drawn on the bankrupt which drafts specified that they could be forwarded for collection through Bank of America National Trust and Savings Association; the bankrupt represented to Motores that the drafts would be paid promptly the same as a check; the aforesaid promise was not kept but the bankrupt intended to fulfill said promise at the time it was made; Motores never gave any notice of rescission to anyone prior to the filing of its answer and cross-petition on August 13, 1953, in this proceeding; the language of the drafts themselves indicated no intention on the part of Motores or the bankrupt that title to the vehicles was to be retained by Motores until the drafts were paid, and the presence of an unpaid draft at the Bank did not constitute notice to the Bank of any defect in the title to the vehicles; the said unpaid drafts were not brought to the attention of any officer of the Bank until after all of the advances referred to in Findings 2, 3, 4 and 5 had been made by the Bank.

Based upon the foregoing Findings of Fact the Court makes the following

Conclusions of Law

1. Motores de Mexicali, S. A. is estopped to contend that it has a right to the vehicles or their proceeds superior to that of the Bank of America National Trust and Savings Association.

2. The Bank of America had a valid lien upon the vehicles and now has a valid lien upon the

proceeds thereof in the hands of the Trustee as follows: [69]

		Amount of	Net Amount Due Bank after Deduction of Bank's Share of Expenses
Vehicle	Engine No.	Bank's Lien	of Sale
1951 Buick	65129114	\$1200.00	\$1140.00
1950 Oldsmobile	8A357041H	1137.00	1080.75
1952 Chevrolet	KAA49792	1068.00	1011.60
1952 Chevrolet	KAA14343	1068.00	1014.52
1948 Cadillac	486328723	1614.00	1614.00
1952 Buick	66741345	) 2410.00	2402.00
1950 Chevrolet	HAA702291		
1947 Mercury	799A1626018		
Aggregating		\$8497.00	\$8262.87

3. The Trustee is entitled to deduct from the Bank's share of the proceeds that portion of his reasonable expenses of sale allocable to said share as follows:

Vehicle	Engine No.	Reasonable Expenses of Sale
1951 Buick.....	65129114	\$ 60.00
1950 Oldsmobile.....	8A357041H	56.25
1952 Chevrolet.....	KAA49792	56.40
1952 Chevrolet.....	KAA14343	53.48
1947 Mercury.....	799A1626018	8.00
Aggregating		\$234.13

4. As between Motores de Mexicali, S.A. and E. A. Lynch, Trustee in Bankruptcy, Motores de Mexicali is entitled to recover of the Trustee the surplus realized by the Trustee from the sale of the following-described vehicles in amounts shown below less that portion of the Trustee's reasonable expenses of sale in the amounts shown below: [70]

Vehicle	Engine No.	Gross Amount of Surplus plus Due Motores de Mexicali, S.A.	Motores' Portion of Trustee's Reasonable Expenses of Sale	Net Amount Due Motores de Mexicali
1951 Buick	65129114	\$100.00	\$ 5.00	\$ 95.00
1950 Oldsmobile	8A357041H	113.00	6.25	106.75
1952 Chevrolet	KAA49792	132.00	6.60	125.40
1952 Chevrolet	KAA14343	82.00	4.02	77.98
1952 Buick	66741345	) 1372.32	12.00	1360.32
1947 Mercury	799A1626018			
Aggregating		\$1799.32	\$33.87	\$1765.45

5. The Bank is not entitled to interest after the date of bankruptcy.

6. The motion of the Bank to strike the testimony relating to the conversations between the representative of Motores de Mexicali, S. A. and the representative of the bankrupt was proper and must be granted, so far as the Bank is concerned.

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed:

1. That E. A. Lynch, Trustee, pay over to Bank of America National Trust and Savings Association the sum of \$8262.87.

2. That E. A. Lynch, Trustee, pay over to Motores de Mexicali, S. A. the sum of \$1765.45.

3. That E. A. Lynch, Trustee, retain the balance of the impounded fund in the sum of \$326.82 as a part of the Estate herein.

4. That no interest be allowed to either Bank of [71] America National Trust and Savings Association or Motores de Mexicali, S. A.

5. That the motion of the Bank of America National Trust and Savings Association to strike the testimony pertaining to the conversations between the representative of the bankrupt and the representative of Motores de Mexicali, S. A. is granted.

Dated this 27th day of January, 1954.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy. [72]

[Endorsed]: Filed January 27, 1954.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER

To the Honorable Reuben G. Hunt, Referee in
Bankruptcy:

Comes now your petitioner, Motores de Mexicali, S. A., a corporation of the United States of Mexico, the claimant and a creditor herein, and petitions for a review of the order made and entered herein on the 27th day of January, 1954, entitled "Findings of Fact, Conclusions of Law, and Order", and respectfully shows:

I.

That your petitioner is the claimant and a creditor herein and an interested party to the within proceeding.

II.

That Motores de Mexicali, S. A., a corporation

of the United States of Mexico will hereinafter be referred to as Motores and the Bank of America National Trust & Savings Association will hereinafter be referred to as the Bank.

III.

That on or about the 29th day of July, 1953, a petition was filed by the Bank to reclaim certain automobiles therein described and for an order directing the trustee to abandon certain [74] motor vehicles described in Schedule A attached to said petition, and to pay over to the Bank certain moneys derived from the sale of the motor vehicles described in Schedule B attached to said petition. On the basis of said petition, an order to show cause was issued directing the trustee in the above entitled bankruptcy estate to show cause why said petition should not be granted and said order to show cause was noticed for hearing and argument on August 13, 1953, at 10 a.m. on said day.

IV.

In response to said petition for reclamation, an answer and cross-petition was filed by Motores, the claimant herein, praying for the following cross-relief:

a. That said Motores is the owner of and entitled to immediate possession of the automobiles described in said cross-petition and that the trustee deliver possession thereof to said cross-petitioner.

b. That the Court determine that the Bank has no valid pledge, mortgage, claim or lien upon said

automobiles or any of them, under the trust receipt certificates alleged in the reclamation petition of the Bank, and

c. That in the event the trustee cannot deliver said automobiles to cross-petitioner in their original form and is in position to deliver said property in a modified form, that the trustee be required so to do.

V.

That a hearing on said petition for reclamation, the trustee's answer thereto, and on the aforesaid cross-petition was originally noticed on August 13, 1953, at 2 p.m. before the above entitled Court. The petitioner, the Bank, appeared by its attorney, Hugo A. Steinmeyer, Robert H. Fabian and Robert Van Buskirk, appearing by Robert H. Fabian; E. A. Lynch, Trustee in Bankruptcy, appeared by his attorneys Craig, Weller & Laugharn, [75] appearing by C. E. H. McDonnell; and cross-petitioner and claimant herein, Motores, appeared by its attorneys Ernest R. Utley and John L. Mace, appearing by Ernest R. Utley. The matter came on for hearing on said date and was continued to August 19, 1953, at 10 a.m. Oral and documentary evidence was offered by the parties and at the close of the testimony the Court ordered a transcript made and ordered the parties to submit written arguments in support of their respective positions. The cause was ordered submitted upon the filing of the last brief.

VI.

The Referee, being fully advised, made and filed

on November 19, 1953, a Memorandum Opinion relative to title to the motor vehicles and their proceeds involved, and on January 27, 1954, made and filed its Findings of Fact, Conclusions of Law, and Order, granting relief to the Bank as prayed for in its petition for reclamation and granting relief to Motores against the trustee but denying relief to Motores against the Bank as prayed for in its cross-petition.

VII.

That objections were filed by Motores in this action on or about January 14, 1954, to the proposed findings, and Motores offered proposed findings of fact, conclusions of law and order, which objections and proposed findings were rejected by the Court as appears from the files and records herein.

VIII.

Petitioner contends that the findings are contradictory and are not sustained by the record and also that said findings are interspersed with conclusions of law and are in a large measure argumentative, and that the Court specifically erred in the following respects:

1. That this Honorable Court erred in finding (Finding No. 2) that the Bank advanced to the bankrupt the moneys therein set forth [76] in reliance upon the trust receipt executed and delivered by the bankrupt to the Bank on April 6, 1953.

2. That this Honorable Court erred in finding (Finding No. 3) that the Bank advanced to the

bankrupt the moneys therein set forth in reliance upon the trust receipt executed and delivered by the bankrupt to the Bank on April 8, 1953.

3. That this Honorable Court erred in finding (Finding No. 4) that the Bank advanced to the bankrupt the moneys therein set forth in reliance upon the trust receipt executed and delivered by (Finding No. 5) that the Bank advanced to the the bankrupt to the Bank on May 9, 1954.

4. That this Honorable Court erred in finding bankrupt the moneys therein set forth in reliance upon the trust receipt executed and delivered by the bankrupt to the Bank on May 19, 1953.

5. That this Honorable Court erred in finding (Finding No. 8) that possession of the vehicles therein referred to was held by the bankrupt pursuant to trust receipts therein set forth.

6. That this Honorable Court erred in finding (Finding No. 10) that Motores delivered the Mexican registration papers and bills of sale to the bankrupt in order to enable the bankrupt to include the vehicles in the trust receipts issued by the Bank and in order to obtain loans upon the security of said trust receipts.

The Court further erred in finding that Motores consented to the creation of liens in favor of the Bank in derogation of its proprietary rights in and to said vehicles.

7. That this Honorable Court erred in finding (Finding No. 11) that Motores consented to and

had knowledge that the Mexican registration papers and bills of sale therein referred to were to be used by the bankrupt for the purpose of creating liens in favor of the Bank in derogation of the proprietary rights of Motores in and to the vehicles therein referred to.

The Court further erred in finding that the loans made by [77] the Bank to the bankrupt were had in reliance upon the possession of the bankrupt of said vehicles and upon reliance of the bankrupt's indicia of ownership in and to said vehicles.

8. That this Honorable Court erred in finding (Finding No. 12) that the Bank had no knowledge that the sales by Motores to the bankrupt of the vehicles therein referred to were cash sales and that the Bank had no knowledge that the bankrupt made representations to Motores that the purchase money drafts issued by the bankrupt to Motores for said vehicles would be paid upon presentment.

9. That this Honorable Court erred in finding (Finding No. 13) that the bankrupt at the time it issued the drafts, intended to fulfill its promise to Motores that the drafts would be paid immediately upon presentation, at the time said promise was made.

The Court further erred in finding that the Bank had no knowledge of the bankrupt's promise to honor said purchase money drafts upon their presentment.

10. That this Honorable Court erred in finding

(Finding No. 14) that Motores' did not act with that degree of care reasonably to be expected of a seller of motor vehicles in the same or similar circumstances as set forth in said finding.

The Court further erred in finding that the particularized circumstances set forth in said finding constituted factual and legal negligence on the part of Motores or lack of business care.

11. That this Honorable Court erred in finding (Finding No. 15) that the bankrupt had the indicia of ownership in and to said vehicles and that the Bank was reasonably justified in concluding that the bankrupt had sufficient title to enable the bankrupt to give a first lien upon the vehicles in derogation of the proprietary rights of Motores.

The Court erred in finding that the bankrupt's title to the vehicles was not dependent upon the payments of the drafts, [78] and that the Bank had no reason to believe and was not in possession of any facts indicating that Motores and the bankrupt intended the sales to be sales for cash.

12. That the Honorable Court erred in finding (Finding No. 16) that the credit officer of the bank had no knowledge, prior to May 19, 1953, that the purchase money drafts issued and delivered by the bankrupt to Motores were unpaid at the time the loans were made by the Bank to the bankrupt.

The Court further erred in finding that the Bank had no knowledge that said purchase money drafts were unpaid at the time the loans were made by it to the bankrupt and that the Bank was justified

in making the loans on the premise that the registration certificates, under the facts in the record, amounted to indicia of ownership and that Motores extended credit to the bankrupt for the amount of the purchase price of said vehicles.

13. That this Honorable Court erred in finding (Finding No. 17) that the bankrupt intended to pay said drafts at the time it issued and delivered them to Motores.

The Court further erred in finding that non-payment of the drafts were never called to the attention of the Bank at the time the loans were made by it to the bankrupt as stated in said finding.

14. That this Honorable Court erred in its conclusion of law (No. 1) that Motores is estopped to contend that it has a right to the vehicles or their proceeds superior to that of the Bank.

15. That this Honorable Court erred in failing to make the following conclusions of law:

a. That the physical delivery by Motores to the bankrupt of the vehicles together with the simultaneous delivery of the paper muniments of title to said vehicles, and the payment of the purchase price for said vehicles were all concurrent conditions [79] and mutually dependent acts, and the transaction not only between Motores and the bankrupt but also between Motores and the Bank was a cash transaction.

b. That the bankrupt's drafts (Exhibits A, B, C, D, and E) constituted only a conditional payment of the purchase price. The failure of the

bankrupt to have said drafts honored and paid upon their presentation to the Bank for payment has vitiated the sale transaction ipso facto and ab initio, irrespective of the bankrupt's pretended honest intentions when the drafts were issued. The payment of the purchase price by worthless drafts or checks is tantamount to payment by counterfeit money in specie.

c. That the provisions of the Negotiable Instruments Act as well as the provisions of the Sales Act must be considered. Therefore, where a check or draft given by the buyer to the seller for the purchase price is unpaid upon presentation in due course of business, there is no sale, and the title to the property is revested in the seller by operation of law, and no rescission is required to enable the seller to have restitution of his own property.

d. That when a check or draft is issued to the seller for the purchase price, it is not a sale on credit, since the seller has a right to believe and rely that the purchase check or draft is not worthless and that it would be paid upon presentation.

f. That the Bank was not a bona fide purchaser of the vehicles, it stood in the shoes of the bankrupt, and the Bank could acquire no better title than the bankrupt. The failure by the bankrupt to honor and pay its drafts rendered the sale a nullity, and the bankrupt had no interest in the vehicles which it could mortgage or pledge, and the Bank had no lien on the vehicles.

g. That the acceptance by Motores of the bankrupt's purchase drafts cannot be tortured into an

estoppel on the part of Motores against the Bank. That the drafts were deposited by Motores in [80] the regular course of business, that the Bank had actual knowledge that the drafts were unpaid, and that title to the vehicles was thereupon revested in Motores. That the flooring financing of the bankrupt contemplated and included the payment of the drafts, and that the flooring financing and the payment of the drafts all constituted a part and parcel of the same transaction, and that the Bank was charged with knowledge thereof.

h. That the Court erred in not concluding as a matter of law that the Bank was charged with notice and put upon inquiry because of the fact that unpaid drafts were in its possession at the time it advanced money upon its flooring contract agreements.

16. That the findings of the Court are contrary to and in conflict with the evidence in the case.

17. That the conclusions of law made by the Court are contrary to the law of the case.

18. That the order of the Court granting relief to the Bank is contrary to the law and the evidence.

19. That the Court erred in sustaining objection to certain evidence offered by Motores and in overruling certain objections made to evidence offered by the Bank.

Wherefore, petitioner, feeling aggrieved because of the order hereinabove referred to, prays that the same be reviewed as provided by Section 39-c

of the Bankruptcy Act; that said order be reversed; that petitioner be adjudged to have title to the vehicles set forth in the cross-petition of Motores, and in and to the proceeds derived from the sale of said vehicles. That the Honorable Reuben G. Hunt, Referee in Bankruptcy, prepare his Certificate of Review and attach thereto the following:

1. Order of Adjudication. (Need not be attached but reference made to same in Clerk's file.)

2. Transcript of reporter of all the evidence taken upon the [81] hearing on the petition, answers, and cross-petition hereinabove referred to, including transcript at hearing on objections to findings.

3. All exhibits admitted in evidence upon the hearing on the petition, answers, and cross-petition hereinabove referred to.

4. Petition to Reclaim Property—filed July 29, 1953.

5. Order to Show Cause re Petition.

6. Answer of Trustee to petition to reclaim property.

7. Answer, Affirmative Defense and cross-petition of Motores.

8. Memorandum Opinion relative to title to certain motor vehicles or their proceeds.

9. Objections to proposed findings of fact and conclusions of law.

10. Proposed findings of fact and conclusions of law offered by Motores.

11. Findings of Fact, Conclusions of Law, and Order, dated January 27, 1954.

12. Petition for Review.

Respectfully submitted,

JOHN L. MACE and
ERNEST R. UTLEY,

/s/ By ERNEST R. UTLEY,
Attorneys for Motores de
Mexicali, S. A. [82]

Duly Verified. [83]

Affidavit of Service by Mail attached. [84]

[Endorsed]: Filed February 6, 1954.

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW

Of Referee's Order Relative to Answer and Cross
Petition of Motores de Mexicali, S. A., a Cor-
poration of the United States of Mexico, to
Petition of Bank of America to Reclaim Cer-
tain Autos and for an Order Directing the
Trustee to Abandon Other Autos to Said Bank
and to Pay Over to the Bank Monies Derived
from the Sale of Still Other Autos.

Craig, Weller and Laugharn, Attorneys for
Trustee.

John L. Mace and Ernest R. Utley, Attorneys for
Motores de Mexicali, S. A.

Hugo A. Steinmeyer, Robert H. Fabian and Rob-
ert Van Buskirk, Attorneys for Bank of America
National Trust and Savings Association. [85]

I.—Statement of the Case

This is covered in the Referee's Memorandum Opinion up to the point where it was filed, Nov. 19, 1953. This opinion accompanies this certificate. Findings of Fact, Conclusions of Law and Order were signed, filed and entered herein on Jan. 27, 1954. Thereafter, and on Feb. 6, 1954, Motores de Mexicali, S. A., filed herein its petition for a review of said order of Jan. 27, 1954.

II.—Questions Presented

These are also set forth in said Memorandum Opinion.

III.—Comments on the Evidence and the Law

This is also set forth in the Memorandum Opinion.

IV.—Findings of Fact and Conclusions of Law

These are also set forth in the order entered herein on Jan. 27, 1954.

V.—Deficiencies in Petition for Review

It will be noted in the petition for review that the errors alleged therein are set forth in general terms only. Bankruptcy Act Sec. 39c provides that the petition for review shall set forth the order complained of and the alleged errors in respect thereto. It is thought that it is improper practice to allege that a finding is not supported by the evidence, without showing wherein such finding is not so supported. A substance of the evidence on the subject should be stated so the reviewing court may determine whether or not there is any substantial

support for the particular finding. It is also thought that it is improper [86] practice to allege that errors of law, such as conclusions of law, have been committed without stating why the same are against the law. The Court's attention in this respect is called to the following cases: in re Florsheim, D.C. Cal., 38 A.B.R.(N.S.) 142, 24 F.S. 991, and the Ninth Circuit cases cited therein. In re Musgrave, N.D. W.Va. 40 A.B.R. (N.S.) 683, 27 F.S. 341; in re Fineman, D.C. Md. 42 A.B.R. (N.S.) 566, 32 F.S. 212.

This situation is summed up in the following statement of the Court in the case of *Virginian Ry. vs. Chambers* (C.C.A. 4th Cir.), 46 F.(2d) 20, the Court said:

"This court cannot undertake to sift the evidence and endeavor to discover an error, simply because the plaintiff has assigned error in general terms."

Furthermore, it seems only fair that the respondent on review should be apprised of the basis and reasons for the errors charged in the petition for review so he may have ample opportunity to prepare his defense.

It is also suggested that the labor of the reviewing court would be much lessened if the practice indicated herein respecting petitions for review was insisted upon.

VI.—Documents Accompanying This Certificate

1. Petition to Reclaim Property, filed July 29, 1953.

2. Answer, Affirmative Defense and Cross Peti-

tion of Motores de Mexicali, S. A., a corporation of the United States of Mexico, filed Aug. 13, 1953.

3. Answer of Trustee in Bankruptcy to Order to Show Cause filed Aug. 13, 1953.

4. Stipulation filed Aug. 18, 1953. [87]

5. Reporter's Transcript of Proceedings on Order to Show Cause, filed Aug. 19, 1953.

6. Petition to Abandon Burdensome Assets and Order thereon, filed Aug. 21, 1953.

7. Statement of Disposition of Cars Under Reclamation by Bank of America and/or Motores de Mexicali, filed Aug. 26, 1953.

8. Stipulation to Impound Funds and Release Title pending further Order of Court, filed Sept. 2, 1953.

9. Memorandum Opinion relative to title of Certain Motor Vehicles or their Proceeds, filed Nov. 19, 1953.

10. Objections to Proposed Findings of Fact and Conclusions of Law offered by the Bank of America National Trust & Savings Association, filed Jan. 14, 1954.

11. Findings of Fact, Conclusions of Law and Order filed Jan. 27, 1954.

12. Petition filed Feb. 6, 1954, for a review of Referee's Order of Jan. 27, 1954.

13. All Exhibits Received in Evidence.

Dated: Feb. 8, 1954.

/s/ REUBEN G. HUNT,

Referee in Bankruptcy [88]

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
PETITION FOR REVIEW

To Motores de Mexicali, S. A., and to John L. Mace and Ernest R. Utley, Its Attorneys; to E. A. Lynch, Trustee in Bankruptcy of Erbel, Inc., dba Bi-Rite Auto Sales, and to Craig, Weller & Laugharn, His Attorneys:

Please Take Notice That the respondent on review Bank of America National Trust and Savings Association will on March 22, 1954, at 9:45 a.m., in the Courtroom of the Honorable Wm. M. Byrne, United States District Judge, in the United States Courthouse in Los Angeles, California, move the Court to dismiss the petition of Motores de Mexicali, S. A., filed February 6, 1954, for review of the Referee's order of January 27, 1954, in the above-entitled case upon the ground that the said petition for review fails to comply with Section 39c of the Bankruptcy Act in that it fails to set forth the alleged errors in the order complained of, with sufficient particularity.

HUGO A. STEINMEYER,
ROBERT H. FABIAN and
ROBERT VAN BUSKIRK,

/s/ By ROBERT H. FABIAN,
Attorneys for Respondent on Review, Bank of
America N. T. & S. A. [89]

Affidavit of Service by Mail attached. [90]
[Endorsed]: Filed March 5, 1954.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: March 22, 1954. At Los Angeles, Calif.

Present: Hon. Wm. M. Byrne, District Judge;
Deputy Clerk: Edw. F. Drew; Reporter: Thos.
Goodwill.

Counsel for Bank of America: Robert Fabian;
Counsel for Motores de Mexicali, S. A.: Ernest R.
Uteley; Counsel for Trustee E. A. Lynch: C. E. H.
McDowell.

Proceedings: For hearing (1) motion of Bank
of America to dismiss petition for review; (2) peti-
tion of Motores de Mexicali, S.A., for review of
Referee's order, filed Jan. 27, 1954.

Counsel make statements and stipulate that mo-
tions be submitted without oral argument.

Court makes a statement.

It Is Ordered that said motions be submitted.

EDMUND L. SMITH,
Clerk,

/s/ By EDW. F. DREW,
Deputy Clerk

[91]

In the United States District Court for the Southern District of California, Central Division

In Proceedings No. 57,280-WB

In the Matter of ERBEL, INC., dba BI-RITE AUTO SALES, Bankrupt.

ORDER DENYING PETITION FOR REVIEW

The above matter came on for hearing on March 22, 1954, upon the petition of Motores de Mexicali, S. A., to review an order of the Honorable Reuben G. Hunt, Referee in Bankruptcy, entered January 27, 1954. The said order of the Referee was made upon the petition of the Bank of America National Trust and Savings Association to reclaim certain motor vehicles and monies from the Trustee in Bankruptcy, the Trustee's answer to said petition to reclaim, and the answer, affirmative defense and cross-petition of Motores de Mexicali, S. A. The petitioner-on-review, Motores de Mexicali, S. A., was represented by its attorneys Ernest R. Utley and John L. Mace, appearing by Ernest R. Utley, and the respondent-on-review, Bank of America National Trust and Savings Association, was represented by its attorneys Hugo A. Steinmeyer, Robert H. Fabian and Robert Van Buskirk, appearing by Robert H. Fabian.

The parties having filed points and authorities setting forth their arguments and having waived oral argument, the matter [92] was ordered submitted to the Court for its decision on March 22, 1954, and the Court, being fully advised, has here-

tofore on April 14, 1954, announced its decision that the order of the Referee of January 27, 1954, be affirmed;

Now, Therefore, the Court hereby adopts the Findings of Fact and Conclusions of Law of the Referee made January 27, 1954, and

It Is Hereby Ordered, Adjudged and Decreed That the petition of Motores de Mexicali, S. A., for review of the aforesaid order of the Referee of January 27, 1954, be denied, and

It Is Further Ordered, Adjudged and Decreed That the order of the Referee dated January 27, 1954, be and it hereby is affirmed.

Dated this 29 day of April, 1954.

/s/ WM. M. BYRNE,

United States District Judge [93]

Affidavit of Service by Mail attached. [94]

[Endorsed]: Judgment Filed and Entered April 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Motores de Mexicali, S. A., a corporation of the United States of Mexico, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the United States District Court, Southern District of California, Central Division, made and entered

on April 29, 1954, adopting and affirming the order of the Referee made and entered in this proceeding on January 27, 1954, and denying the petition of said Motores de Mexicali, S. A., for a review of the aforesaid order of the Referee.

Dated this 19th day of May, 1954.

/s/ ERNEST R. UTLEY,

Attorney for Appellant [95]

Affidavit of Service by Mail attached. [96]

[Endorsed]: Filed May 26, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 102, inclusive, contain the original Petition in Bankruptcy; Orders of Adjudication and of General Reference; Petition to Reclaim Property; Answer, Affirmative Defenses and Cross-Petition of Motores de Mexicali, S.A.; Answer to Order to Show Cause; Stipulation; Petition to Abandon Burdensome Assets and Other Thereon; Statement of Disposition of Cars Under Reclamation by Bank of America and/or Motores de Mexicali; Stipulation to Impound Funds and Release Titles Pending Further Order of Court; Memorandum Opinion Relative to Title to Certain Motor

Vehicles or Their Proceeds; Objections to Proposed Findings of Fact, Conclusions of Law Offered by Bank of America; Findings of Fact, Conclusions of Law and Order of Referee; Petition for Review; Certificate on Review; Motion to Dismiss Petition for Review; Order Denying Petition for Review; Notice of Appeal and Two Designations of Record on Appeal and a full, true and correct copy of Minutes of the Court for March 22, 1954 which, together with Reporter's Transcript of Proceedings on Order to Show Cause on August 13, 1953 and the Original Exhibits Before the Referee in Bankruptcy, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 17 day of June, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

In the United States District Court for the Southern District of California, Central Division

In Bankruptcy—No. 57,280-WB.

In the Matter of ERBEL, INC., dba BI-RITE AUTO SALES, Bankrupt.

TRANSCRIPT OF PROCEEDINGS

Thursday, Aug. 13, 1953, at 2:00 o'clock p.m.

Before the Honorable Hugh L. Dickson, Referee in Bankruptcy; the Honorable Reuben G. Hunt, Referee in Bankruptcy, Presiding.

Appearances: For the Trustee: Craig Weller & Laugharn, by C. E. H. McDonnell, Esq. For Motores de Mexicali, S.A., a corporation of the United States of Mexico: Ernest R. Utley, Esq. For Bank of America: Robert H. Fabian, Esq. [1*]

* * * * *

E. A. REDFERN

called as a witness, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. McDonnell): Mr. Redfern, are you the adjuster for Mr. E. A. Lynch, the Trustee in this matter? A. I am.

Q. And are you generally familiar with the transactions in the administration of the estate?

A. Yes.

Q. As far as you know, the Sheriff was in pos-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of E. A. Redfern.)

session, was he not, when the Receiver took over?

A. That is right.

Q. And did you arrange to pick up any money or any property from the Sheriff?

A. Yes, sir.

Q. What did you pick up from him in the way of cash, checks and conditional sales contracts?

A. We got a check from the Sheriff for \$4,954.93.

Mr. Utley: Four thousand and what?

The Witness: \$4,954.93.

Q. (By Mr. McDonnell): Did you receive any uncashed checks, that is any checks that the Sheriff had taken in? A. No.

Q. Did you receive any conditional sales contracts on any automobiles sold while the Sheriff was in possession?

A. Well, those were got from BiRite, not from the Sheriff.

Q. You mean conditional sales contracts that arose while the Sheriff was in charge?

A. That is right.

Q. Did any of those cover the Zimmerman, the Mays or the Cohen automobiles? A. Yes.

Q. Which one was that? [14]

A. Well, I have those three contracts right here.

Q. I see; and you have not discounted them? We still have them in our possession; is that correct? A. Yes, we still have them.

Q. And what are the amounts of the respective contracts?

(Testimony of E. A. Redfern.)

The Referee: I am more interested in this: Did the Sheriff give you an itemized statement of what that cash consisted of, how he got that?

The Witness: We have a more or less itemized statement but it doesn't show any names from where the money came on that, on the Sheriff's statement. However,——

Mr. Fabian: Mr. Redfern, I want to direct your attention to this statement made by the Sheriff.

The Witness: That is a statement by the keeper of what he turned over to the Sheriff.

The Referee: And what does that show as far as the cars are concerned that we are interested in?

The Witness: It shows a 1948 Cadillac, License No. 1S67865, and it shows that he got \$1,672.82.

Mr. Fabian: In the form of——

The Witness: It looks like a Bank of America, Melrose and La Brea, check.

Mr. Fabian: And the number?

The Witness: Check No. 17E.

Mr. Fabian: And the date? [15]

The Witness: And the date is 6-17-53.

The Referee: All right, go ahead and give us the rest of it.

The Witness: The other one is Rudolph Mays, a Bank of America Check No. 5675, drawn on the Washington and Vermont Branch on 6-19-53, in the amount of \$125.

Q. (By Mr. McDonnell): Are there any other Mays funds that are marked on that keeper's record, Mr. Redfern?

(Testimony of E. A. Redfern.)

A. Yes. There is Check No. 3222, Bank of America, Western and Santa Monica Branch, \$450, on a 1952 Buick.

Mr. Utley: What is the date of that check?

The Witness: 6-24-53.

Mr. Utley: What does that show—does that show what car that was?

The Witness: A 1952 Buick.

Mr. Utley: Give the number of it?

The Witness: License No.—there is no motor number on it.

Mr. Utley: What is the license number?

The Witness: IY61107.

Mr. Utley: Now, that is the car that I am interested in.

The Witness: That is right.

The Referee: I see.

Mr. Utley: Is there a contract on that Buick also, Mr. Redfern? [16]

The Witness: Yes, there is a contract here.

Mr. Utley: What is the amount of the contract?

The Witness: The amount of the contract?

Mr. Utley: Yes.

The Witness: The original purchase price was \$2,595, sales tax of \$90.83, \$1 for the transfer of license, making a total of \$2,686.83, on which there was a trade-in apparently for \$450, credit.

Mr. Utley: That is probably that \$450 check item.

Mr. Fabian: Yes.

The Witness: Yes, and there is \$195.83, which

(Testimony of E. A. Redfern.)

I think is the pay-off, but they gave him credit here for \$541. It left an unpaid balance of \$1,500.

Now, in regard to that, I believe that the—there were two checks, one check of \$100—

Mr. Fabian: No, no, they are the same checks.

The Witness: What is this here (indicating)?

Mr. Fabian: Apparently that is the amount that was applied on the receipt that the Sheriff took. In other words, they only gave him credit for \$541.

The Witness: Yes. They gave him credit for \$541, and it looks like we got the money.

Mr. Fabian: And you got the money?

The Witness: It looks like it, doesn't it?

Mr. Fabian: Yes.

The Witness: Yes. [17]

Mr. Fabian: The Trustee received the \$541 that Mr. Mays paid in in cash; is that correct?

The Witness: Yes.

Mr. Fabian: All right, now let's take the Cohen automobile.

The Witness: We got \$407.16, a Bank of America check, Check No. 22790, from Barbara Cohen, on a 1950 Chevrolet, License No. 1Y61111. There is a balance due on the contract of \$934.16, and we still hold the contract.

Q. (By Mr. McDonnell): \$934.16, the balance due on the contract? A. Yes.

The Referee: Let me get this clear in my mind. There are three cars the Sheriff sold; is that right?

The Witness: Yes, sir.

(Testimony of E. A. Redfern.)

The Referee: And just how much cash came from each car—for each car from the Sheriff, that is now in the Trustee's hands or was in his hands at one time?

The Witness: Well, on the Zimmerman car there was \$1,672.82.

The Referee: All right. Now, the next car?

The Witness: On the Mays car there was \$541.

The Referee: And the third car?

The Witness: On the Cohen car there was \$407.16.

The Referee: Now, what is the total of that?

The Witness: Well, sir, I will have to add it up.

The Referee: If you don't mind just adding it.

The Witness: My figures make it \$2,620.98.

Mr. Fabian: That is correct.

The Referee: Any further questions of this witness?

Q. (By Mr. McDonnell): Do your records show that other automobiles other than these three were sold, Mr. Redfern, and proceeds, some proceeds of the sale in cash came into the hands of the Sheriff and was passed on to you?

A. Yes.

The Referee: What has that got to do with these three?

Mr. McDonnell: I want to make my record.

The Referee: All right, but I'm entitled to know what your purpose is.

Mr. McDonnell: My purpose, as I stated before, is to prove that there was one fund of money

(Testimony of E. A. Redfern.)

that came into the hands of the Trustee and it was not broken down at all as to these three cars.

The Referee: That is not important at all. I don't get your point at all. What is it? We have traced this money into the hands of the Trustee. What is your point?

Mr. McDonnell: I don't think that constitutes tracing.

The Referee: I do.

Mr. McDonnell: That is my point, with all due respect to the Court. [19]

The Referee: What is your point? You haven't made it clear yet.

Mr. McDonnell: My point in brief is this, that to prevail on a trust fund theory they must be able to identify the specific dollars.

The Referee: Haven't they done that here?

Mr. McDonnell: No.

The Referee: Why not?

Mr. McDonnell: Because we have a conglomerate fund, a group of dollars.

The Referee: You can't take four thousand silver dollars and say, "This is it."

Mr. McDonnell: Precisely.

The Referee: The Sheriff got certain money for the cars and turned it over. What is wrong with that?

Mr. McDonnell: Obviously the very difficulty your Honor pointed out is the difficulty that all trust fund claimants face, they cannot trace the funds.

(Testimony of E. A. Redfern.)

The Referee: Is that your point, that they must trace the dollars?

Mr. McDonnell: Unfortunately that is the state of the law, I think.

The Referee: I'll rule against you.

Mr. McDonnell: Well, that is your Honor's prerogative.

Mr. Fabian: In view of Mr. McDonnell's position, [20] your Honor, I think these records ought to go into evidence. I don't like to clutter up the record but I think that they ought to go in.

The Referee: Won't that be unintelligible to a reviewing court?

Mr. Fabian: No, I don't think so.

The Referee: If we have a statement from Mr. Redfern how much money was received from the Sheriff and what it covered, won't that be sufficient?

Mr. Fabian: I think so, but I don't want my record to be insufficient here when I have the document here.

The Referee: Why not have Mr. Redfern prepare a statement of the total amount received and what it is composed of?

Mr. Fabian: The statement is here. That is what I would propose to put in evidence.

The Referee: Oh, I thought you meant all those other papers.

Mr. Fabian: No—that one, plus——

The Referee: There must be another one there.

(Testimony of E. A. Redfern.)

Mr. Fabian: There is another one—with the receipts attached.

The Referee: Well, I thought Mr. Redfern gave us a figure of some \$4,000.

Mr. Fabian: That is the other statement that ties back—— [21]

The Referee: Oh, that is another one. Any objection to these going in evidence?

Mr. McDonnell: I haven't seen them.

Mr. Utley: I have no objection.

The Referee: Well, you want to see the money identified, don't you?

Mr. Utley: On one of them, yes, but I am satisfied with the identification already.

Mr. Fabian: This should go with that (indicating).

The Referee: Hand it to Mr. McDonnell, will you?

Mr. Fabian: All right.

Mr. McDonnell: All these documents are going in, are they, Mr. Fabian?

Mr. Fabian: Yes.

Mr. McDonnell: Fine. I have no objection.

The Referee: All right, they will be received in evidence as Bank of America's Exhibit No. 1.

Mr. Fabian: Do you have any further questions, Mr. McDonnell?

Mr. McDonnell: No, I have no further questions.

(Testimony of E. A. Redfern.)

Cross Examination

Q. (By Mr. Fabian): Mr. Redfern, with respect to the Mays automobile, did you also take over as the representative of the Trustee a 1947 Mercury automobile that was traded by Mr. Mays in connection with his purchase of the Buick? [22]

A. We have a 1947 Mercury 8.

Q. Will you give the motor number?

A. Motor No. 799A1626018.

Q. Do your records show how BiRite acquired that vehicle?

A. Well, the envelope here shows purchased from Rudolph A. Mays, 2235 West 27th Street, Los Angeles.

Q. Is that the envelope that pertains to the sale of the 1952 Buick Riviera to Mr. Mays?

A. Not the same envelope, Mr. Fabian, no, sir. However, the number of this envelope is 670. On the car that Mr. Rudolph Mays bought, the Buick, it says, "Trade-in, Stock No. 670, \$450."

Q. And "Stock No. 670" is the 1947 Mercury?

A. Is the 1947 Mercury.

Q. The 1947 Mercury is in your inventory, isn't it?

A. Yes, sir.

Mr. McDonnell: I will offer to stipulate on behalf of the Trustee—I don't know to whom the 1947 Mercury will eventually belong, but it will not belong to the estate, and that is an item which the Trustee views as traceable since it can be identified.

Mr. Utley: Well, I think I have traced it.

(Testimony of E. A. Redfern.)

The Referee: Whenever I see a dollar I certainly can identify it.

Q. (By Mr. Fabian): Now, Mr. Redfern, I believe you [23] have testified as to the conditional sales contracts you have in your hands there are only two, is that correct, one on the Barbara Cohen automobile and the other one on the Rudolph Mays automobile?

A. Also the Zimmerman.

Q. Well, the Zimmerman I understand was a cash transaction, was it not? A. Oh, yes.

Q. There is no conditional sales contract on that?

A. No, sir. That was a cash deal apparently.

Q. So you have two conditional sales contracts, one on each of those——

A. One on Barbara and Carl Cohen.

Q. Covering a 1950 Chevrolet?

A. Covering a 1950 Chevrolet.

Q. Can you give the motor number of that vehicle, please? A. Yes; HAA702291.

Q. And you also have a conditional sales contract on the 1952 Buick Riviera, Engine No. 66741345; is that correct?

A. That is the Mays?

Q. Yes.

A. No. That contract was sold to Fred W. Gray.

Q. Do you have an address for Fred W. Gray?

A. Yes, 1955 South Figueroa. [24]

Q. Who sold it to Mr. Gray?

(Testimony of E. A. Redfern.)

A. BiRite. It was sold before the Receiver went in. That car was sold apparently—well, 6-19. Mr. Gray owns the contract.

Q. Has Mr. Gray paid for the contract, do you know?

A. No, there is \$1,500 due on it.

Q. So Mr. Gray hasn't paid BiRite; is that correct? A. No.

Q. And he hasn't paid you?

A. No. There is \$1,612 due the Bank of America.

The Referee: Let me ask you a question here, Mr. Redfern. You had Henry Zimmerman down for \$1,672.82.

The Witness: Oh, Zimmerman, pardon me, sir, you have the figures there.

Q. (By the Referee): Well, you give me what your figures are? A. \$1,672.82.

Q. What is the next one?

A. The next contract?

Q. Yes, of the three?

A. That is one; then there is Barbara Cohen.

Q. How much? A. \$934.16.

Mr. Fabian: No, that is the unpaid balance on the contract.

The Witness: That is the unpaid. [25]

Q. (By the Referee): But I mean the cash that came in? A. Oh, the cash we got?

Q. \$462.16; is that it?

Mr. Fabian: Yes, that was the amount of the check.

The Witness: \$407.16, was it not?

(Testimony of E. A. Redfern.)

The Referee: It shows here \$462.16. What are your figures?

The Witness: Yes, but this is the money the Sheriff got.

Q. (By the Referee): Oh, pardon me. \$407.16?

A. Yes.

Q. Now the Mays, the total amount was how much? A. \$541; \$100 and \$441.

Q. I wanted to be sure about it. Then this \$1,672.82 is what the Sheriff got on the Zimmerman?

A. Yes, that is what was in the \$4,000.

The Referee: All right. Go ahead.

The Witness: Oh, yes, in regard to the Gray deal——

Q. (By Mr. Fabian): Yes. Have you made demand on Mr. Gray for the \$1,500?

A. No, sir. Mr. Mays advised that in order to pay off that contract it would be necessary to collect either from Mr. Mays or Mr. Gray \$1,612, the total amount of the flooring.

Q. Mr. Mays advised that?

A. Yes, sir. [26]

Q. I take it you haven't collected the \$112 either then? A. No, sir.

Q. So to summarize the Mays transaction, you have a 1947 Mercury that was traded in and you also have a conditional sales contract covering the car on which there is \$1,500 due from Fred Gray, and you also have cash in the sum of \$541; is that correct?

(Testimony of E. A. Redfern.)

A. Well now, you will have to just stop a moment on that. Yes, that is right.

Mr. Fabian: All right. I have no more questions of Mr. Redfern.

The Referee: Any questions?

Mr. McDonnell: No more questions.

Mr. Utley: No questions.

The Referee: All right, you are excused, Mr. Redfern.

Well, it is 3 o'clock. We will recess for a few minutes.

(Recess.)

The Referee: All right, let's go ahead.

Mr. Fabian: Your Honor, I would like to call Mr. Beaver out of order. He is our appraiser and he can put in the valuations and then be excused.

R. S. BEAVER

called as a witness, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Fabian): What is your business or occupation, Mr. Beaver?

A. President Beaver Hudson Corporation.

Q. How long have you been engaged in that business? A. 12 years.

Q. How long have you been engaged in the automobile business? A. The same.

Q. And your business includes the purchase and sale of new and used automobiles, does it?

A. Correct.

(Testimony of R. S. Beaver.)

Q. And you have handled many thousands of sales in those 12 years; is that correct?

A. Yes, sir.

Q. Are you familiar with current market values of used cars, Mr. Beaver? A. Yes, sir.

Q. Did you make an appraisal of certain vehicles on the BiRite lot at the request of the Bank of America? A. Yes, I did.

Q. Do you have a report of that appraisal with you?

A. No, I think you have that. [28]

Mr. Utley: While counsel is looking for that, was your appraisal based on the reasonable saleable value of the cars, retail saleable value?

The Witness: I believe I gave a wholesale valuation and also a retail valuation.

The Referee: Both?

The Witness: Yes, sir.

The Referee: Show it to counsel, will you, please?

Mr. Fabian: Yes, sir.

Mr. McDonnell: Mr. Beaver, I forgot to catch it. Is the Mercury on there?

The Witness: No.

Mr. Fabian: The 1947 Mercury?

Mr. McDonnell: Yes.

Q. (By Mr. Fabian): As a matter of fact, you haven't seen the Mercury?

A. No, sir.

Q. Mr. Beaver, I show you two documents dated July 31, 1953, and August 11, 1953, directed to the

(Testimony of R. S. Beaver.)

Bank of America, and ask you whether that is your signature appearing on the two documents?

A. That is.

Q. That is a statement of your considered opinion of the fair market value of the vehicles that are described on those documents?

A. Yes, it is. [29]

Q. Did you examine the cars?

A. Yes, I did.

Q. Approximately how long a time did you spend in examining those vehicles?

A. I spent about a half a day.

Q. Did you also check recent sales of other vehicles? A. Yes.

Q. In making up your mind?

A. Yes, I did.

Mr. Fabian: If there is no objection I think we could just put in the appraisal report and excuse Mr. Beaver.

Mr. Utley: We have no objection.

Mr. McDonnell: No objection.

Mr. Utley: Because each vehicle is identified.

The Referee: You are excused. This will be Bank of America's Exhibit No. 2.

Next witness.

Mr. Fabian: I will call Mr. Fort.

The Referee: He has already been sworn, I think.

Mr. Fabian: Yes.

JOHN A. FORT

recalled, testified further as follows:

Mr. Fabian: Now, since the Trustee has—perhaps I had better put it in.

Direct Examination [30]

Q. (By Mr. Fabian): Mr. Fort, you are—what is your business or occupation?

A. Assistant Cashier of the Bank of America.

Q. At Wilshire and La Brea?

A. At the Wilshire and La Brea Branch.

Q. And your duties there are in connection with the making of—with automobile financing; is that correct? A. Yes.

Q. And are you in charge of the department at that branch? A. Yes.

Mr. Fabian: Since the Trustee has stipulated as to the validity of the trust receipts, your Honor, I don't see any reason for cluttering up the record with all of these documents other than those as to the cars in which Mr. Utley is interested. Do you agree that is all I need to put in?

Mr. McDonnell: I think that is all you need to put in.

The Referee: Do you have any question about the trust receipts?

Mr. Utley: Yes, I do, your Honor.

The Referee: That stipulation only applies to the Trustee then.

Mr. Utley: That is right. But we are only interested in five of the cars.

Mr. Fabian: Yes. [31]

(Testimony of John A. Fort.)

Q. Mr. Fort, did you handle the account—for convenience we will refer to it as the flooring account of BiRite Auto Sales, the bankrupt, for the flooring of automobiles at your branch?

A. Yes.

Mr. Fabian: Have you seen these, Mr. McDonnell?

Mr. McDonnell: Yes. That is all right.

Mr. Fabian: May it be stipulated, gentlemen, that a statement of trust receipt financing was filed with the Secretary of State on November 28, 1952?

Mr. Utley: If you say that is true, that is all right.

Mr. Fabian: This is the document. I can put it in evidence. I might as well put it in.

Q. (By Mr. Fabian): Mr. Fort, I will show you a document entitled Statement of Trust Receipt Financing, No. 110755, and ask you whether or not you have ever seen it before?

A. Yes, I have.

Q. Is that a statement removed from your files maintained at the La Brea-Wilshire Branch?

A. Yes.

Q. And did you cause that to be forwarded to the Secretary of State? A. Yes.

Q. In November, 1952?

A. November 21, 1952. [32]

Mr. Fabian: I offer that in evidence.

The Referee: All right, that will be Bank of America's Exhibit No. 3.

(Testimony of John A. Fort.)

Q. (By Mr. Fabian): Mr. Fort, I will show you a Trust Receipt No. 7483. Now, this pertains to Cars Nos. 3 and 4, which are paired, the third and fourth cars on the petition to reclaim.

Mr. McDonnell: You are referring to a 1952 Pontiac, Motor No. T8WH5586 and 1952, Lincoln Cosmopolitan, Motor No. 52LP5111H?

Mr. Fabian: That is correct.

Q. I will show you this trust receipt and ask you whether that was executed and turned over to the bank on or about the date it bears?

A. That is correct.

The Referee: By whom?

Q. (By Mr. Fabian): Executed by whom?

A. Erwin Resnick of BiRite, Erbel, Inc.

Mr. McDonnell: While I have no objection to your line of questioning, Mr. Fabian, I can't see that it is really material since we agree we are going to have to pay the bank \$3,357 to clear those two automobiles, or give the cars back.

The Referee: That may be, but Judge Utley—

Mr. McDonnell: It is not involved with Mr. Utley at all. [33]

Mr. Fabian: If I may have your stipulation that the balance due on the trust receipt is \$3,357.

Mr. McDonnell: Certainly.

Mr. Fabian: And if we have the cash or the cars by Wednesday, then there is no need to go into that.

Mr. McDonnell: That was my intent in the

(Testimony of John A. Fort.)

stipulation hitherto made, but I will restipulate on that basis, Mr. Fabian.

Q. (By Mr. Fabian): Mr. Fort, I show you Trust Receipt No. 7684, dated April 6, 1953, and ask you whether that document was executed and delivered to the bank on or about the date it bears?

A. Yes, it was.

Q. Executed by BiRite Auto Sales, by Erwin G. Resnick? A. That is right.

Q. Did you receive any other documents when you received that trust receipt, particularly pertaining to a Buick 1951, Buick 8, Engine No. 651-29114? A. Yes.

Q. What were those documents?

A. An ownership certificate.

Q. Is this the document? I show you the pink slip. A. Yes, it is.

The Referee: Is that the same as the pink certificate? [34]

The Witness: Yes, that is the California ownership certificate.

Q. (By Mr. Fabian): Now, what did you give in return for that trust receipt, Mr. Fort?

A. We gave them a credit of \$5,755.

Q. And that covered not only the vehicle as to which I have been asking you about but also other vehicles; is that correct?

A. Yes, that is true.

Mr. Fabian: You have seen these ledger sheets?

Mr. Utley: Yes.

Q. (By Mr. Fabian): Mr. Fort, I want to

(Testimony of John A. Fort.)

show you the ledger sheet of Erbel, Inc. and ask you whether you can find on that ledger sheet where a credit was given to the account of Erbel, Inc., doing business as BiRite Auto Sales?

The Referee: What bank now? Bank of America, what branch?

Mr. Fabian: Wilshire-La Brea.

The Witness: That is April——

Q. (By Mr. Fabian): April 6th?

A. Yes, we gave credit. Here is the entry right here, \$5,755 on April 6th—April 7th, rather.

Q. And that is a deposit entry shown in the ledger sheet; is that correct?

A. That is correct.

Q. Does that mean that funds were deposited in that [35] amount to the account of Erbel, Inc. on that day?

A. That is correct.

Mr. Fabian: Now, gentlemen, if there is no objection I would like to offer in evidence the trust receipt, and I will put the original trust receipt in and a photostat of the pink slip.

Mr. McDonnell: Mr. Fabian, I have no objection except I call your attention to this fact: Doesn't that trust receipt cover two automobiles?

Mr. Fabian: No, I'm on Item 10 now, which only covers one automobile.

Mr. McDonnell: It is a 1951 Buick? Just the 1951 Buick?

Mr. Fabian: That is the only one I think that is left on that.

Mr. McDonnell: I see. O.K.

(Testimony of John A. Fort.)

Mr. Utley: No objection on our part.

Mr. McDonnell: No objection.

Mr. Fabian: I offer these two instruments as a pair, your Honor.

The Referee: That is Bank of America's Exhibit 4.

Mr. Fabian: Is that No. 7684 in the corner?

The Referee: Yes.

Q. (By Mr. Fabian): The California Title Certificate, Exhibit 4, on that vehicle, when was that presented to you, Mr. Fort? [36]

A. The same date the trust receipt was presented.

Q. Was that your standard practice, to require —on this account, to require the presentation of the California Ownership Certificate before advancing any money on the basis of the car?

A. In all cases.

Q. I will show you Trust Receipt No. 7704, dated April 8, 1953, covering a 1950 Oldsmobile, Motor No. 8A357041H, and also an ownership certificate, and ask you to tell the Court when you received that and what you did when you received it?

A. That would have been on or about April 8th, which was the date of the trust receipt.

Q. And did you give a credit to the account of BiRite Motor Sales? A. We did.

Q. In return for that trust receipt?

A. That is correct.

Q. Do you find that on the ledger sheet?

(Testimony of John A. Fort.)

A. The amount of \$1,137 was credited on April 8th.

Mr. Fabian: All right. I offer that in evidence, the trust receipt original and the photostat of the pink.

The Referee: Bank of America's Exhibit No. 5.

Mr. Utley: That was the Oldsmobile, wasn't it?

Mr. Fabian: Yes.

Q. Mr. Fort, I show you Trust Receipt No. 7884, [37] dated May 19, 1953, and ask you when you first received that document?

A. That would have been on or about that date, May 19th.

Q. 1953? A. Yes.

Q. Did you give a credit when you took that trust receipt in?

A. We did, in the amount of \$4,925.

Q. Does that show on the ledger sheet that is in front of you?

A. \$4,925 was credited to the account on May 21, 1953.

Q. Did you receive any other document when you received that trust receipt?

A. Yes. We received four California Ownership Certificates.

Q. Are these documents two of the California Ownership Certificates that you received at that time? A. They are.

Q. And by "these documents," I refer to California Vehicle Certificates numbered T-1308392 and

(Testimony of John A. Fort.)

T-1308394. Those are the ones you received with this trust receipt? A. That is correct.

Mr. Fabian: I offer this——

Mr. Utley: Let me ask you, counsel, which of your [38] cars are covered in that one?

Mr. Fabian: Those are the two Chevrolets, Mr. Utley.

Mr. Utley: Those will be Exhibit 6?

The Referee: That is right, Bank of America's Exhibit 6.

Q. (By Mr. Fabian): Mr. Fort, I show you Trust Receipt No. 7845 covering two automobiles, executed the 9th of May, 1953, and ask you whether you received that on or about the date it bears, in the bank? A. We did.

Q. Did you make an advance on the basis of that trust receipt? A. We did.

Q. How much? A. \$2,410.

Q. And does that advance show on the ledger sheet as a deposit?

A. Yes. It was credited to the account on May 9, 1953.

Q. Did you receive any other documents with that trust receipt?

A. We received two California Ownership Certificates.

Q. Numbered—will you put the numbers in the record, please?

Mr. Utley: Counsel, are any of my cars in that one?

Mr. Fabian: Yes. One of them is the Mays auto-

(Testimony of John A. Fort.)

mobile [39] and the other one is the Cohen automobile. The Mays automobile is your Buick.

Mr. Utley: That is right.

Mr. Fabian: Or the Buick you claim. I will correct that.

The Referee: What do you mean by saying "your Buick"?

Mr. Fabian: I corrected that.

Mr. Utley: We will stipulate you were right the first time.

Q. (By Mr. Fabian): Those are California Ownership Certificates Nos. T-1294537 and T-129-4539; is that correct? A. That is correct.

Mr. Fabian: I offer them in evidence.

The Referee: That will be Bank of America Exhibit No. 7.

Q. (By Mr. Fabian): Now, Mr. Fort, at the time you made the advances of credit on those trust receipts, did you have any knowledge that those cars—that BiRite had not paid for those cars? A. I did not.

Q. Is it part of your duties to check with the Collection Department to see whether there were any unpaid drafts in on vehicles before you loaned money on them?

Mr. Utley: I object to that as——

Mr. Fabian: It is anticipatory and I will withdraw the question. [40]

The Referee: All right.

Q. (By Mr. Fabian): Now, Mr. Fort, with respect to those trust receipts that have just been

(Testimony of John A. Fort.)

placed in evidence—what are the numbers, 4 to——

Mr. McDonnell: To 7, inclusive.

The Referee: Seven different ones, I believe.

Mr. Fabian: The trust receipts, I think, are 4 to 7.

Mr. McDonnell: 4, 5, 6 and 7.

The Referee: That is right.

Mr. Fabian: Exhibits 4, 5, 6 and 7——

Mr. Utley: Counsel, can you tell me which exhibit that 1951 Buick is in?

Mr. McDonnell: That is Exhibit 4.

The Referee: Yes, that is right.

Q. (By Mr. Fabian): Can you tell me whether the bank has been paid for the—or repaid the amounts advanced on the basis of those trust receipts?

A. No, they have not been paid.

The Referee: You are referring now to Exhibits 4, 5, 6 and 7?

Mr. Fabian: Yes, your Honor.

Q. You have not been paid? A. No.

Q. Can you give the balances owing—can you give the balance owing on Exhibit No. 4? I think it would be a [41] good idea to put the balance in—plus interest, if you have calculated it.

The Referee: I see no harm, he can just write that down. It is his evidence.

Mr. Fabian: All right.

Mr. Utley: Let him write it for each car so I will know what the situation is on the cars I'm interested in.

(Testimony of John A. Fort.)

The Referee: That will be better still.

Mr. Fabian: Well, it can't be done for each car because each trust receipt stands on its own feet, you see.

The Referee: Well, if you cannot do it for each car then you can do it for each trust receipt. Give the number and sign your name and put the amount down.

Q. (By Mr. Fabian): Do you have that paper on which you calculated the interest, Mr. Fort, with you? Did you save a copy?

A. Yes, I have a copy of it in there——

Q. In my brief case?

A. Yes, in that miscellaneous folder.

Q. Mr. Fort, I am asking you to write the balance owing on each trust receipt, plus interest to date, August 13, 1953.

Now, the second one is on Exhibit——

The Referee: This is Exhibit 4. Now, you have got Exhibit 5?

Mr. Fabian: Yes. [42]

Mr. Utley: What did he say was the amount due on that 1951 Buick?

The Referee: \$4.20 interest.

Mr. McDonnell: That is all that is due on the Buick?

Mr. Fabian: That is the interest; \$1,204.20 altogether.

The Referee: \$1,204.20 including interest, yes.

Mr. Utley: Mr. Fabian, if you will tell me the

(Testimony of John A. Fort.)

amount on the Olds when you get it, I would appreciate it.

Mr. Fabian: \$1,140.98.

Now, the next one is Exhibit 6.

The Referee: Did you get the figures on 5?

Mr. McDonnell: Yes.

The Referee: \$1,140.98 including interest.

Mr. Fabian: The balance on that is \$2,136, interest \$7.48.

And the last one——

Mr. McDonnell: What was the total on that one, No. 6?

The Referee: \$2,143.48.

Mr. Fabian: The balance on the next one is \$2,410, interest \$8.44.

The Referee: And this No. 7, on that it is \$2,418.44.

All right, go ahead.

Mr. Fabian: I think that is all.

The Referee: All right, cross examination? [43]

Cross Examination

Q. (By Mr. Utley): Mr. Fort, you testified a moment ago of your own personal knowledge that you didn't know there were any unpaid drafts, I believe you said, didn't you? A. Yes.

Q. You knew, did you not, that the bankrupt or BiRite Auto Sales had been purchasing cars from Motores de Mexicali in Mexico?

A. As of what date or what time?

Q. Well, first, you knew of that, didn't you?

(Testimony of John A. Fort.)

The Referee: You ought to give him a date.

The Witness: I did sometime in May. I don't recall the exact date.

Q. (By Mr. Utley): Well, while the drafts were still in the bank?

A. The day that the last drafts to my knowledge were returned. That is the first knowledge I had.

Q. That appears to have been on May 19, 1953, that the last drafts were returned. Then you knew of that transaction at that time? A. Yes.

Q. And you knew that there were a number of drafts then in the bank that had not been paid?

A. I did on that date, yes.

Q. Now, isn't it a fact that subsequent to that [44] date you extended a credit to BiRite on your ledger sheet here of—a credit on some of the cars purchased from Motores de Mexicali?

A. On what date?

Q. You gave a date a while ago, I think it was the 21st.

The Referee: Wasn't it the 19th?

Mr. Utley: I think the date of the trust receipt shows on the Chevrolets the 19th. That was the date the drafts were returned, and the credit I think shows on the 21st of May.

The Witness: Well, of course, that day, on the 19th, if we took them in on the 19th it is very possible that they would not have been credited until the 21st. However, I don't recall that 21st date.

(Testimony of John A. Fort.)

Mr. Utley: Now, at this time, may it please the Court, I have the automobile purchase draft which involves a 1951 Buick Two-Door Sedan, Motor No. 65129114 for \$1,300. I would like to have that marked as Creditor's Exhibit 1.

The Referee: We had better call it "A", hadn't we?

Mr. Utley: Creditor's Exhibit A.

Mr. Fabian: For identification?

Mr. Utley: Yes, for identification.

The Referee: I'm just wondering where to mark it.

Mr. Utley: Maybe you can get it on the bottom of that little piece of paper attached there. [45]

The Referee: I guess I can do it here.

Mr. Fabian: What is the number of that one, Mr. Utley, the first one?

Mr. Utley: You mean the motor number?

Mr. Fabian: Well, the motor number or some way to identify it.

Mr. Utley: Well, it is the 1951 Buick and there is only one 1951 Buick involved in the ones I'm interested in.

The Referee: All right, go ahead.

Mr. Utley: I have now an automobile purchase draft dated March 6, 1953, involving a 1950 Oldsmobile Four-Door Sedan, that we have heretofore mentioned, and I would like to have that marked as Creditor's Exhibit B for identification.

The Referee: That will be Exhibit B. Go ahead.

Mr. Utley: I now have an automobile purchase

(Testimony of John A. Fort.)

draft dated April 2, 1953, for \$1,350, covering a 1952 Chevrolet automobile, Four-Door Sedan—I had better identify them by Motor Number because there are two Chevrolets. KAA14323. I would like to have that marked as Creditor's Exhibit C.

The Referee: For identification?

Mr. Utley: Yes, for identification.

The Referee: All right.

Mr. Utley: The next one is another 1952 Chevrolet Four-Door Sedan, Motor No. KAA49792, for \$1,350, dated April 2, 1953, and I would like to have that marked as Creditor's [46] Exhibit D for identification.

And then another automobile purchase draft dated April 2, 1953, for \$2,000, covering a 1952 Buick Riviera; and without giving the motor number, this is the Buick that was sold to Mr. Mays. I would like to have it marked for identification. That would be Exhibit E, I believe.

The Referee: That is right.

Q. (By Mr. Utley): Now, Mr. Fort, I am going to call your attention to the Bank of America's Exhibit No. 6, which covers the same Chevrolets that are shown in the automobile purchase drafts of the debtor, Exhibits C and D for identification, and what day now did you—what date was this money advanced on those two Chevrolets, by the bank on the trust receipt?

Mr. Fabian: That is objected to as asked and answered.

Mr. Utley: This is cross examination.

(Testimony of John A. Fort.)

The Referee: Well, what is wrong with asking him what date the money was advanced?

Mr. Fabian: Well, he has already testified to it.

Mr. Utley: Well, the date of the trust receipt is May 19th.

The Witness: It would be on or about that date.

Q. (By Mr. Utley): Now, calling your attention to the back of these two drafts, which are Exhibits D and E for identification, those drafts were returned by your bank on [47] the same date, weren't they, unpaid?

Mr. Fabian: I object to the question as improper cross examination. The documents speak for themselves and there were no questions asked——

The Referee: Well, it helps clear up the record. This man knows what he is talking about. Let him tell us. I don't see any harm in that.

The Witness: The stamp here says it was returned on May 19, 1953.

Q. (By Mr. Utley): Is that your stamp?

Mr. Fabian: I object to the form of the question.

The Witness: Personally I can't tell.

The Referee: Well, I have no doubt you mean by "your stamp" the stamp of the bank?

Mr. Utley: That is right.

The Witness: Well, I mean all I can go on is what I can read, and I can't read it.

Q. (By the Referee): Well, does that look like the bank's stamp?

(Testimony of John A. Fort.)

A. I would say that it is a bank stamp, yes, but I have no way of knowing.

Q. (By Mr. Utley): Well, you said you had knowledge of these drafts on or about the date they were returned?

A. I didn't say these drafts. I don't know these drafts from any other drafts. I was told there were some drafts being returned. [48]

Q. Now, will you check your ledger sheet which is in evidence here——

Mr. Fabian: That is not in evidence, Mr. Utley. I have no objection to it going in if you want it in.

The Referee: That is right.

Q. (By Mr. Utley): Will you examine your ledger sheet and find where the bankrupt was given credit for these two Chevrolets, or the moneys advanced on them, what date they were given credit?

The Referee: The bankrupt given credit?

Mr. Utley: Well, the money loaned to the bankrupt, yes.

The Referee: Debited against the bankrupt, wasn't it?

Q. (By Mr. Utley): No, they loaned the money on the strength of the trust receipt. That is right, isn't it?

A. Yes, on the trust receipts and the title.

Q. Yes. What day does that statement show——

A. The credit was actually posted on the ledger on May 21, 1953. However, I have no way of knowing—I suppose it was entered in the dealer's book on May 19th.

(Testimony of John A. Fort.)

Q. But you don't know?

A. No, I don't.

Mr. Utley: I believe that is all at this time.

The Referee: Anything further from this witness? I guess you are excused.

Mr. Fabian: Just one more question. [49]

Redirect Examination

Q. (By Mr. Fabian): You stated that you knew of the presence of Motores de Mexicali drafts in the bank on May 19th; is that correct, Mr. Fort, or thereabouts?

A. Well, I actually didn't know the name. I was told that a bunch of drafts had been called back by the Calxico Branch for some Mexicali dealer. I didn't examine the drafts and didn't know the name.

Q. You didn't know anything about it before that time; is that right?

A. Any drafts being in the bank?

Q. Yes. A. No, I did not.

Mr. Fabian: That is all.

Mr. Utley: There is one question on cross examination I overlooked, your Honor.

Recross Examination

Q. (By Mr. Utley): Mr. Fort, when the bankrupt came in—he came in and asked you for this money on these trust receipts that have been offered in evidence? A. Who asked us for it?

Q. The bankrupt, BiRite Auto Sales. They

(Testimony of John A. Fort.)

asked you to advance them the money on the strength of these trust receipts? [50]

A. Well, it is customarily understood. We have an agreement with them to do that when they bring them in, just like you do a check; we wouldn't ask any questions.

Q. Did they say what they wanted the money for?

A. No, except in the natural conduct of their business, as far as I know.

Q. And did you know the nature of their business called for them to purchase secondhand automobiles from various dealers on the strength of automobile purchase drafts?

Mr. Fabian: When?

The Witness: I couldn't answer that particularly because the only thing that I was dealing with this particular dealer on was California titles. So I knew nothing about where they were purchasing their cars. I have heard in conversation that they were purchasing part of their cars from out of State.

Mr. Utley: That is all.

The Referee: Any further questions?

Mr. Fabian: No further questions.

The Referee: You are excused.

How much time will this take, gentlemen? I will give you all the time you need but I have to plan ahead.

Mr. Fabian: I am through.

Mr. Utley: It won't take me very long.

The Referee: Can we get through today? [51]

Mr. Utley: Yes.

The Referee: All right. We will recess then.

(Recess.)

The Referee: Go ahead, gentlemen.

Mr. Utley: Are you through, Mr. Fabian?

Mr. Fabian: I have rested.

Mr. Utley: I would like to call Mr. Resnick under 21-J.

ERWIN G. RESNICK

called as a witness, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Utley): Mr. Resnick, you were the manager of the bankrupt here? A. Yes, sir.

Q. Now, you know Mr. Luken sitting back here? A. Yes.

Q. You also know Mr. Rodriguez?

A. Yes, sir.

Q. Was Mr. Rodriguez working for you in March and April of this year?

A. He represented us as a buyer, yes, sir.

Q. As a buyer where? A. In Mexicali.

Q. And did you authorize him to purchase automobiles [52] from Motores de Mexicali in Mexicali for you?

A. He was authorized to buy automobiles from anyone in Mexicali.

Q. Including Motores de Mexicali?

A. Including Motores de Mexicali.

Mr. Utley: May I have those exhibits, your Honor, those drafts?

(Testimony of Erwin G. Resnick.)

Q. (By Mr. Utley): Now, you bought a good many automobiles from Mr. Luken of the Mexicali Motors prior to March and April of 1953, did you not? A. Oh, yes, sir.

Q. And I will show you Creditor's Exhibit C for identification, and in the purchase of those automobiles did you always give a purchase draft similar to that? A. Yes, sir.

Q. And do you recognize the signature on that draft? A. Yes, sir.

Q. Who is that?

A. Mr. Mario Rodriguez, and this is also one of our own drafts.

Q. It is one of your own printed drafts signed by Mr. Rodriguez? A. Yes.

Q. And he was authorized to sign those drafts?

A. Yes, sir.

Q. Now, were all the automobiles purchased from [53] Motores de Mexicali purchased on drafts of that type? A. Yes, sir.

Q. And up until then—up until certain drafts that came in in March and April of 1953, were your drafts always paid promptly? A. Yes, sir.

Q. Now, when you first talked to Mr. Luken of Motores de Mexicali, did you ask to have the possession of the cars and the titles to the cars before the drafts went through and were paid?

Mr. Fabian: I object to this as not binding on the bank, this conversation, if he had any, and being hearsay as to us.

Mr. Utley: Well, it certainly goes to tie the

(Testimony of Erwin G. Resnick.)

transaction to the question of whether or not the cars were obtained on the promise that the drafts would be paid promptly.

The Referee: Oh, I don't see any harm in the question. Objection overruled.

The Witness: This goes back to the—this conversation we had as far as getting title to the cars goes back before there was even ever an Erbel, Inc. I used to do business with them some time ago.

Q. (By Mr. Utley): You also had a conference even before Erbel was incorporated?

A. Yes, sir.

Q. With reference to purchasing automobiles from [54] them? A. Yes, sir.

Q. And with reference to acquiring the cars and titles immediately upon the issuance of the drafts?

A. Yes, sir.

Q. And what did you say to them at that time with reference to your financial ability to pay?

A. Well, I told them we formed this Erbel, Inc., Mr. Cowan was with me, that is Mr. Ray Cowan, he was with me at the time, and we told them we have Bank of America flooring plus the fact we had a guarantee of a substantial amount of money at the bank.

Q. Did you tell them at that time that Mr. William D. Cowan had a continuing guarantee at the bank of a hundred thousand dollars?

A. Yes, sir.

Q. And did you tell them that the drafts would be paid promptly upon presentation?

(Testimony of Erwin G. Resnick.)

A. Yes, sir. They always have been.

Q. And they always were up until this bunch of drafts? A. Yes.

Q. Now, showing you Creditor's Exhibits A, B, C, D and E, have any of those drafts ever been paid?

A. If they would have been we would be in possession of these envelopes. [55]

Q. Well, you would say then that they haven't been? A. No, sir.

Q. The papers there in front of you, Mr. Resnick, indicate that you floored these cars through the Bank of America and obtained money. For what purpose were those cars floored?

A. We used to floor them—we used to floor a majority of our cars for the purpose of carrying on our business and also paying the drafts.

Q. Were those cars floored for that purpose?

A. They were floored for carrying on our business.

Q. Well, any of the money that you got from the flooring of those cars didn't go to pay the drafts, did it? A. No.

Q. Now, do you recall along about April 2nd when you came down to Mexicali to purchase a number of cars from Mr. Luken of the Mexicali Motors?

A. Well, I don't recall the exact date. I know I went down to Mexicali.

Q. At the time you were there do you recall his having asked you if all the drafts for the month of

(Testimony of Erwin G. Resnick.)

March had been taken care of? A. Yes.

Q. And you recall telling him that they had been?

Mr. Fabian: I object to that on the ground it is immaterial to any of the issues before this Court as to the [56] title to the vehicles.

The Referee: What is the purpose of it?

Mr. Utley: It shows the representations that were made at the time of obtaining possession of the cars and title to them.

The Referee: You mean representations made to your client?

Mr. Utley: Yes.

The Referee: By the bankrupt?

Mr. Utley: Yes.

Mr. Fabian: But they are not binding on the bank. They are immaterial as far as the bank is concerned.

The Referee: Wouldn't that be so unless the bank knew about it?

Mr. Utley: May it please the Court, I will cover that point later on about the bank.

Mr. McDonnell: I think the Court should also bear in mind this is a three-cornered lawsuit between the Trustee and the bank and Mr. Utley's client.

Mr. Utley: Of course, the bank doesn't stand in the position of an innocent purchaser.

The Referee: That is questionable in California. Go ahead. I think the objection is good unless you

(Testimony of Erwin G. Resnick.)

can show—unless you can tie it up with the bank some way.

Mr. Utley: May it please the Court, I will call your attention in a few minutes as to how and in what manner *the* [57] *is* not in the position of an innocent purchaser.

The Referee: I know, but I mean any conversations like that unless the bank was connected with it wouldn't bind the bank, would it?

Mr. Fabian: That is my point.

Mr. Utley: This particular conversation won't bind the bank. In other words, we don't contend that the bank was a party to the transaction in question, to the transaction of getting the cars away from my client without paying for them—at that particular moment, anyway.

The Referee: I think you had better drop that line unless you can connect it with the bank in some way.

Mr. Utley: Well, I believe that is all then with this witness.

The Referee: Any other questions of this witness?

Mr. Fabian: Yes, your Honor.

Cross Examination

Q. (By Mr. Fabian): Mr. Resnick, when you obtained these vehicles from Motores de Mexicali, obtained possession of them, physical possession of them, did you receive any documents from Motores de Mexicali? A. Yes, I did.

(Testimony of Erwin G. Resnick.)

Q. What documents did you receive?

A. The title of the car.

Q. A bill of sale. [58]

A. A registration and a bill of sale.

Q. What registration is that?

A. Well, Mexico is a non-title State. That is the Mexican registration.

Q. You received a Mexican registration certificate; is that right? A. Yes.

Q. And a bill of sale; is that right?

A. That is right.

Q. And you received those when you took possession of the car; is that correct?

A. As a rule when we took possession of the car or else Mr. Rodriguez would pick them up the next day for us and air mail them up here.

Q. But they were not transmitted through the bank? A. That is right.

Q. Now, what did you do with those documents, Mr. Resnick?

A. We would plate the cars in the State of California.

Q. You would turn those documents in to the Department of Motor Vehicles?

A. And get title and registration, yes, sir.

Q. What was in these envelopes that are in front of you there? A. Nothing. [59]

Q. As the Creditor's exhibits?

A. Nothing, sir.

Q. Well, one of them has some papers in it. Do you want to open it up and see what that paper is?

(Testimony of Erwin G. Resnick.)

A. It is just blank paper.

Q. A blank piece of paper? A. Yes, sir.

Q. Did all of the drafts in front of you contain blank pieces of paper? A. No, sir.

Q. Some of them were empty?

A. Yes, sir.

Q. Did any of them contain the title documents to these vehicles? A. No, sir.

Mr. Utley: No more questions of Mr. Resnick.

The Referee: Any other questions?

Mr. McDonnell: Yes, I have some questions of Mr. Resnick.

Cross Examination

Q. (By Mr. McDonnell): Mr. Resnick, in response to Mr. Utley's direct examination you told us that you had agreed with Mr. Luken that you would get title to these automobiles at or about the time that physical possession was delivered. Isn't that correct? [60] A. Yes, sir.

Q. Wasn't that what I understand your testimony to be? A. Yes, sir.

Q. When did that agreement take place with Mr. Luken where you agreed to get the title at the time you got possession?

A. Like I explained before, I did business with Mr. Luken quite some time ago before there was ever a Bi Rite Auto Sales.

Q. And had you always done business with Mr. Luken on this basis? A. Yes.

Q. And did you ever give Mr. Luken to under-

(Testimony of Erwin G. Resnick.)

stand why you wanted title to these cars when you got possession?

A. So I could turn them into California title and floor them so I could pay them.

Q. Did you tell him you intended to take the cars and floor the cars with some lending institution in the State of California?

A. Well, that was the original basis of it, yes.

Q. Now, you have got a number of drafts there before you? A. Yes, sir.

Q. I want you to look through them and tell me whether you can recall when those drafts were given and the [61] cars they were given for. Can you recall that occasion? Those are the unpaid drafts.

A. This is only four. We used to buy, I imagine, around 40 or 50 a month, some months maybe more.

Q. With reference to those particular drafts, did you intend or was it your intent not to pay Mr. Luken on those drafts when they were issued?

A. I certainly didn't.

Q. In other words, you didn't issue those drafts and intend not to pay them? A. No.

Mr. McDonnell: I have no further questions.

Redirect Examination

Q. (By Mr. Utley): Mr. Resnick, if you intended to pay those drafts when they were issued, why did you floor the cars and obtain money on the cars and not use that money for the payment of

(Testimony of Erwin G. Resnick.)

the drafts at the time they were in the Bank of America here in Los Angeles?

A. We used to do that quite often. We put money in the bank and paid some of the drafts and used some of the money. We did that all the time. It was just a common practice for us to do it that way. We did that for some time.

Mr. Utley: That is all. [62]

Recross Examination

Q. (By Mr. Fabian): In other words, there was an extension of credit by Motores de Mexicali to you; is that correct?

A. Well, the credit based on the drafts.

Mr. Fabian: That is all.

Redirect Examination

Q. (By Mr. Utley): But you told Mr. Luken that the drafts would be paid promptly upon presentation to the bank?

A. As a rule we always paid them, yes, sir.

Mr. Utley: That is all.

Recross Examination

Q. (By Mr. McDonnell): But you had drafts lay in the bank before, that is before these four, that you paid?

A. Many times we have had to get extensions because we couldn't pay drafts,—not just these but other drafts.

Q. You got extensions from Mr. Luken; is that right? A. Either Mr. Luken or the bank.

Mr. McDonnell: That is all.

Mr. Utley: That is all, Mr. Resnick. Mr. Luken.

MARIO LUKEN

called as a witness, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Utley): Mr. Luken, where do you reside? A. In Mexicali.

Q. And what is the nature of your business or occupation?

A. I am general manager of Motores de Mexicali.

Q. And how long have you been so engaged?

A. Two years.

Q. During the latter part of last year and the first part of this year did you have some business transactions with Mr. Resnick who just left the witness stand? A. Yes, sir.

Q. What was the general nature of those transactions? A. We sold him automobiles.

Q. Now, when you first began to deal with him did you sell wholesale to him? A. Yes, sir.

Q. Automobiles? A. Yes, sir.

Q. When you first began to deal with him, under what name was he operating at that time? I am speaking now [64] of the fall of last year.

A. Before they operated under Bi Rite we used to sell him cars and they were paid with checks on the Mexicali Bank.

Q. That was before they started with Bi Rite?

A. Yes, sir.

Q. Now, after they started with Bi Rite did you

(Testimony of Mario Luken.)

have a conversation with Mr. Resnick with respect to selling him cars? A. Yes, sir.

Mr. Fabian: I object to the conversation as not binding on the bank and hearsay.

The Referee: Wouldn't that be true?

Mr. Utley: May it please the Court, here is the situation. We have a right to show fraud here because otherwise if we sell automobiles under false representations we don't part with them voluntarily, and if the bank has knowledge of some situation that would estop them, that is a question as far as the bank is concerned.

Now, furthermore, there is another question here. If there is any equity in these cars over and above the amount of the bank's interest in them, and these titles to these cars were obtained from Mr. Luken under false pretenses, he would be entitled to that equity without regard to the bank's position.

The Referee: I know, but wouldn't the bank have to [65] be involved some way?

Mr. Fabian: Yes.

Mr. Utley: It is our contention, please the Court, that these drafts—if you will examine them, those drafts are all automobile purchase drafts, and they show on their face that they were for the purchase of a certain automobile, and they show on their face they were to be paid on presentation to the bank. Now, it is our contention that those drafts **laying there in the bank unpaid**, whether Mr. Fort himself knew about it or not, the bank was charged with knowledge that those drafts on those particu-

(Testimony of Mario Luken.)

lar cars described in the drafts had not been paid and they were advancing money on cars that they knew had not been paid for.

The Referee: Assuming all that to be true, how would any conversation of this witness with someone else with which the bank was not concerned bind the bank?

Mr. Utley: Well, in the first place we must show that there was a fraudulent representation made to Mr. Luken in order to——

The Referee: Well, this is the way we will handle it. I will permit the question to be answered but you may move to strike it unless they connect it up with the bank.

Mr. Fabian: All right.

Mr. McDonnell: I think that as to the Trustee's interest, as Mr. Utley is pointing out, I think probably the testimony is relevant and admissible, and that is why I [66] haven't objected.

The Referee: That is right.

Mr. Utley: Mr. Reporter, will you read the last question?

(Record read as follows:

"Q. Now, after they started with Bi Rite did you have a conversation with Mr. Resnick with respect to selling him cars?")

The Witness: Yes, sir, I did.

Q. (By Mr. Utley): And who was present other than Mr. Resnick?

A. Mr. Cowan's son and Mr. Rodriguez.

Q. And where did this conversation take place?

(Testimony of Mario Luken.)

A. In my office in Mexicali.

Q. And do you recall about when?

A. I can't recall.

Q. Was it late last year or early this year?

A. Well, it was more late last year.

Q. And what was said—what did Mr. Resnick tell you?

A. He told me that he wasn't in business any more with Mr. Abel Melendez, who was the man that was paying for the cars with checks in Mexicali, but now he was in a partnership with Mr. Cowan and they had all kinds of money and Mr. Cowan had put up a guarantee with the bank, that they were going to buy the cars with those drafts and the [67] drafts would be paid immediately on getting to the bank.

Q. What if anything did he say to you with respect to your delivering him immediate title to the cars?

A. He told us they needed the titles in order to bring the cars across the border, bring them into California, and then take those papers into the Highway Patrol or the Registration Department here and get the pink slip, and with the pink slip they can floor the cars with the bank and pay the drafts immediately upon presentation to the bank.

Q. And did you believe the representations he made to you with respect to their financial ability to pay upon presentation?

A. Well, I believed him. We had done business with him before.

(Testimony of Mario Luken.)

Q. And did you—after his telling you that, did you give him the title to the cars as well as—

A. Yes, sir.

Q. If you had known that the drafts would not be paid immediately upon presentation, would you have parted with title to the cars?

A. No, sir, because that is one thing I explained to him very clearly. We wouldn't give the titles unless we get the money.

Mr. McDonnell: I didn't get that last.

(Record read as follows:

“We wouldn't give the titles unless we get the money.”) [68]

Mr. Fabian: I move to strike it as not responsive to any question.

Q. (By Mr. Utley): Well, what if anything did you say to him—

The Referee: I suppose that motion is good. Reframe the question.

Q. (By Mr. Utley): What if anything did you say to him, Mr. Luken, when you were talking to him at the time about this being a cash transaction?

A. Well, he told me that those drafts, we can consider that as a check, and they would be paid immediately upon presentation to the bank.

Q. (By the Referee): He said the checks that he gave to you would be paid immediately upon presentation to the bank?

A. They were the same as a check.

Q. He said that would be paid immediately by the bank?

(Testimony of Mario Luken.)

A. They would be paid as soon as they were presented to the bank.

Mr. Utey: May I have those drafts, your Honor?

Q. I am going to show you Creditor's Exhibits A, B, C, D and E and ask you to examine those, Mr. Luken, and are these five drafts five of the automobile purchase drafts that were given to you by Bi Rite Sales?

A. Yes, sir.

Q. And who personally handed those to you?

A. These were handed to me by Mr. Rodriguez.

Q. The gentleman sitting there (indicating)?

A. Yes, sir.

Q. Now, I am going to call your attention to the fact that Exhibits A and B were dated March 6, 1953, and call your attention to the fact that Exhibits C, D and E were dated April 2, 1953. At the time you received the April drafts, did you know that the other two drafts, Exhibits A and B, had not been paid?

A. No, sir. I didn't know that they were unpaid.

Q. You didn't know that they were unpaid?

A. No.

Q. Had your dealings prior to this time in connection with the cashing of drafts been handled by Bi Rite Auto Sales in a prompt manner? That is, had they paid promptly before that?

A. Yes, sir, they had been paying.

Q. Would you have parted with the title to the automobiles upon any other condition other than

(Testimony of Mario Luken.)

that they would be paid promptly upon presentation? A. No, sir.

Mr. Utley: You may examine.

Cross Examination

Q. (By Mr. Fabian): Well, as a matter of fact, Mr. Luken, there had been substantial delays in payments of some of these drafts [70] prior to March 6th, had there not? Didn't you have drafts outstanding before that time for say periods of weeks?

A. Well, we never knew. We were credited by our bank immediately.

Q. Oh, your bank gave you credit on them immediately? A. Yes, sir.

Q. On the basis of your endorsement; is that right? A. That is right.

Q. Once in a while some were returned, though, isn't that true, unpaid?

A. Until we get this, that was the only time I knew that they were unpaid.

Q. Your bank may have known it and you didn't; is that correct? A. They might.

Q. You carry a sizeable bank balance, I take it, with the Banco Mercantil, so that you didn't know specifically what the condition of this account was?

A. No, every time they make a charge to our account they let us know first.

Q. They let you know? A. Yes.

Q. And you didn't check with them to find out

(Testimony of Mario Luken.)

whether these drafts had been paid or not; is that right? A. No, sir.

Q. Now, in this discussion you testified about, [71] Mr. Luken, you testified that Mr. Resnick advised you that—and you understood that the purpose of delivering the title documents in Mexico was that the cars would be floored; isn't that correct?

A. Yes.

Q. And you understand what flooring means and understood at that time what flooring means; is that correct? A. Yes, sir.

Q. And that was contemplated at the time you delivered him the documents? A. Correct.

Q. Now, did you put the blank pieces of paper in those envelopes, Mr. Luken?

A. No, sir, that is the way I was getting all the drafts (indicating). I didn't know there was a piece of white paper inside, or whatever there was inside.

Q. In other words, that is just the way they came to you? A. Yes, sir.

Q. Did you know there was blank pieces of paper inside of some of them?

A. I knew after I opened one when I got this back. I thought maybe it was a list of the cars that Mr. Rodriguez had specifying title or something that Mr. Resnick had, but I didn't know it was a white paper.

Q. Did you put these X's on the reverse of the drafts? [72] A. No, sir.

Q. At the place where it says "Documents Enclosed"? A. No.

(Testimony of Mario Luken.)

Q. Do you know who did?

A. Well, I think Mr. Rodriguez.

Q. You don't know for sure?

A. I don't know for sure.

Q. You didn't see him do it?

A. No, I haven't seen him.

Q. Now, the representation as I understand it that Mr. Rodriguez made to you was that the drafts would be paid?

A. Not Mr. Rodriguez, Mr. Resnick.

Q. Mr. Resnick, that the drafts would be paid?

A. Yes.

Q. And he fell down on that promise; is that right? A. That is correct.

Q. And you placed confidence in that representation, did you not? A. Well,—

Q. You must have.

A. Well, I believed that the draft was going to be paid as he said.

Q. And that is why you gave him the cars and the title; is that right? A. That is right.

Q. Do you feel now that that confidence was [73] misplaced, Mr. Luken?

A. Well, the only way I feel is that we should get our money back.

Mr. Fabian: No more questions.

Cross Examination

Q. (By Mr. McDonnell): Mr. Luken, you have testified concerning this conversation that you had with Mr. Resnick and Mr. Cowan's son was present

(Testimony of Mario Luken.)

and I think Mr. Rodriguez? A. Yes.

Q. Did you have any other conversations with Mr. Resnick or with anyone else from the bankrupt concerning the payment of these drafts, after that time?

A. Any conversation regarding the drafts?

Q. That is right, regarding the purchase of cars by draft? A. No, sir.

Q. That was the one and only conversation you had? A. Yes, sir.

Q. By the way, do you do business with drafts with other American automobile concerns other than this one?

A. Yes, we did it once but that is all.

Mr. McDonnell: That is all the questions I have.

Redirect Examination

Q. (By Mr. Utley): You were asked if you had any other conversations. [74] Did you see Mr. Resnick on April 2nd at the time this last bunch of drafts were issued?

A. Yes, he was in my office in Mexicali.

Q. Did you have any conversation with him at that time as to whether or not all the March drafts had been paid?

A. He went in to buy more cars——

Mr. McDonnell: May we have the foundation?

Mr. Utley: Just say yes or no.

The Referee: Everybody stop. Talk one at a time. Put your question now.

Q. (By Mr. Utley): Just state whether or not

(Testimony of Mario Luken.)

you had a conversation with Mr. Resnick at the time the drafts on April 2nd were issued?

A. Yes, we had a conversation.

Q. And where did that conversation take place?

A. In my office in Mexicali.

A. Who was present?

A. Mr. Cowan's son and Mr. Rodriguez.

Q. And Mr. Resnick?

A. And Mr. Resnick, yes.

Q. And what was said at that time between you and Mr. Resnick.

A. Mr. Resnick said that he wanted to buy more cars, and I asked him how he was with the drafts. He said that everything has been taken care of. So that is why I didn't mind selling him more cars.

Q. Now, Mr. Fabian asked you if Mr. Resnick told you that the drafts would be paid. Did he also tell you that the drafts would be paid immediately upon presentation to the bank?

A. Yes, sir.

Q. The same as a check?

A. Yes, sir.

Mr. Utley: I believe that is all.

The Referee: All right. Next witness. You are excused.

Mr. Utley: Mr. Rodriguez.

M. R. RODRIGUEZ

called as a witness, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Utley): Mr. Rodriguez, I'm going to show you Creditor's Exhibits A, B, C, D and E,

(Testimony of M. R. Rodriguez.)

which are five drafts which purportedly are signed by you. Did you sign those drafts?

A. Yes, sir.

Q. Did you also fill them out?

A. Yes, sir.

Q. And did Mr. Resnick request you to do so?

A. Yes, sir.

Q. And did he request you to purchase the automobiles described in those drafts? [76]

A. Yes, sir.

Q. And was each of the automobiles delivered to you by Mr. Luken? A. Yes, sir.

Q. Now, were you present sometime late last year in a conversation between Mr. Resnick and Mr. Luken with respect to giving drafts of this kind for automobiles? A. Yes, I was there.

Q. I beg your pardon? A. I was there.

Q. And what was said, particularly with reference to the financial ability of Bi Rite to pay for automobiles?

Mr. Fabian: May I have the same objection and same ruling as to this line of questioning?

The Referee: You can move to strike it all out unless it is connected up with the bank.

Mr. Fabian: Thank you.

The Witness: Well, when he got there, he had gotten this new deal and it looked like they had gotten a hundred thousand dollars to guarantee the cars, and that he could pay for them as soon as the cars got there. In other words, as soon as the drafts

(Testimony of M. R. Rodriguez.)

would get there they would be paid for because he had gotten more money to buy them.

Q. (By Mr. Utley): Did he at that time ask to have the title to the cars delivered directly to him upon making out a draft? [77]

A. Oh, I don't remember—I was supposed to keep on doing business the way we were, and as long as he had that guarantee, well, I was just going to keep doing it the way I had been doing it always.

Q. Did you know of any of his drafts being returned until this bunch in March and April?

A. No, sir.

Q. And you signed them all, didn't you?

A. Yes, sir.

Mr. Utley: You may examine.

Mr. Fabian: I don't believe I have any questions of this gentleman.

The Referee: Have you any questions, Mr. McDonnell?

Mr. McDonnell: I don't think so, no, your Honor.

The Referee: Then I guess that is all with this witness then.

Mr. Utley: That is all, your Honor. At this time I would like to offer in evidence Creditor's Exhibits A, B, C, D and E as exhibits.

The Referee: Oh, yes, those that were received for identification will now be received in evidence.

Mr. McDonnell: No objection.

Mr. Fabian: No objection.

The Referee: Now, anything further in this case?

Mr. Utley: That is all the evidence on our behalf.

The Referee: How would it be to have this written up, [78] gentlemen, and then submit it on briefs?

Mr. Utley: Satisfactory to me.

Mr. McDonnell: That is O.K.

Mr. Fabian: The only thing is what happens to the vehicles in the meantime. The market is going down.

Mr. McDonnell: Mr. Utley has stipulated as far as the four in which he is interested that we may sell—that is, to sell and impound, not to disburse the money. We are going to have the sale tomorrow and if we can sell and impound that will prevent the further depreciation of the vehicles.

The Referee: You three can cooperate on that.

Mr. Utley: I have already stipulated.

Mr. McDonnell: We have already stipulated.

Mr. Fabian: What happens if he don't sell them by Wednesday? He is going to sell them tomorrow, but what if we don't get a sale for them tomorrow? Will they turn them over to the bank then?

Mr. Utley: Are you demanding to get your money out of them in each and every case?

Mr. Fabian: Or give us the vehicles.

Mr. McDonnell: Why don't we do this, Judge, put this over tentatively until next Wednesday. In the meantime we will have the sale. If we get enough on the vehicles—do I understand if we get sufficient, Mr. Fabian, we may simply sell and im-

pound, if we get more than you have against [79] them?

Mr. Fabian: Yes.

Mr. McDonnell: If we get less we will then consult as to what to do and then make a decision by next Wednesday.

Mr. Fabian: I guess so, because then the Judge will just be deciding as to the impounded funds rather than the vehicles.

The Referee: How is 11 a.m. next Wednesday?

Mr. McDonnell: That is fine as far as the Trustee is concerned.

Mr. Utley: August 19th I'm not too sure of my calendar.

The Referee: Do you want to make it the 20th?

Mr. Utley: Let's make it the 19th at 11 o'clock and I will be here if I can; and our position, please the Court, is quite simple. We contend that we parted with this title under a false representation. It is a good deal like giving a bum check, and we also concede that had that property reached the hands of an innocent purchaser we couldn't have done anything about it, but the Trustee as to any equity certainly doesn't stand in the position of an innocent purchaser. We contend that the bank isn't an innocent purchaser because of the fact at the time they loaned the money on the cars these unpaid drafts describing those particular cars were lying in the bank that advanced this money.

The Referee: Well, this is complicated and I want to [80] study the law through briefs, if you don't mind.

Mr. Fabian: What about the filing of briefs on it?

The Referee: Do you want to fix that next Wednesday?

Mr. McDonnell: Why don't we fix it from the date that the transcript is filed?

The Referee: What time?

Mr. McDonnell: Well, I don't think we ought to try to proceed before the transcript is filed.

The Referee: Next Wednesday we can fix the date. Is that all right?

Mr. Fabian: I think so. I move to strike, your Honor, the testimony of Mr. Rodriguez and Mr. Luken and——

The Referee: Let's handle that this way, take that under submission and cover that on briefs, too. How will that be? I think that is a good motion.

Mr. Utley: I don't think it is. It is not good against the Trustee in any event because he stands in the position of the bankrupt. I think it is tied in with the bank on the idea you might say a bum check was presented to them for the sales price of that car and it was lying in the bank at the time and they certainly were put on notice.

The Referee: Well, that is the question, whether there was sufficient notice. You cover that in your briefs. [81]

* * * * *

[Endorsed]: Filed August 19, 1953.

[Endorsed]: No. 14397. United States Court of Appeals for the Ninth Circuit. Motores de Mexicali, S. A., a corporation, Appellant, vs. Bank of America National Trust and Savings Association and E. A. Lynch, Trustee of the Estate of Erbel, Inc., doing business as Bi-Rite Auto Sales, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: June 18, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14397

MOTORES DE MEXICALI, S. A.,

Appellant,

vs.

BANK OF AMERICA, N.T. & S.A.,

Appellee.

CONCISE STATEMENT OF POINTS

Appellant Motores de Mexicali, S. A. (hereinafter called Motores) petitioner on review in the District Court from the order of the Referee made and entered on January 27, 1954, respectfully submits the following concise statement of points on which appellant intends to rely:

I.

On the dates set forth in its cross-petition, Motores sold, for cash, and delivered to the bankrupt five automobiles described in said cross-petition, and as a mode of cash payment of the purchase price thereof, the bankrupt issued and delivered to Motores five automobile purchase money drafts referred to in the record as Exhibits A, B, C, D, and E. The automobiles being sold were fully described upon the face of each draft.

Said drafts constituted conditional payment and were signed by the bankrupt, and were payable through the Bank of America National Trust & Savings Association, Wilshire-La Brea Branch. Said drafts were, in due course of banking business, presented at said Bank for payment, and payment thereof was dishonored by the bankrupt and the Bank. The purchase price of said automobiles was at no time paid although said Bank retained said drafts during the entire period it was making the loans to the bankrupt hereinafter mentioned. Said transaction constituted a cash transaction; the delivery of said drafts constituted only a conditional payment of the purchase price; the failure of the bankrupt and the Bank to have said drafts honored and paid upon their presentation in due course of banking business has vitiated the sale transaction ipso facto and ab initio; said drafts were worthless and the purported payment of the purchase price by said worthless drafts was tantamount to payment by counterfeit money in specie.

II.

The provisions of the Negotiable Instruments Act as well as the provisions of the Sales Act must be considered. Therefore, when said drafts were dishonored upon presentation in due course of banking business, there was no sale and the title to said automobiles was thereupon revested in appellant Motores by operation of law.

III.

The appellee Bank of America had knowledge and actual notice, by and through its employees in the collection and loan department, that said purchase drafts were worthless and that title to said automobiles was vested in appellant Motores. Therefore, when the bank floored the automobiles and made the loans to the bankrupt set forth in the Bank's petition for reclamation, it had knowledge of and was charged with actual notice that the automobiles were unpaid for, and that the title to the automobiles was vested in appellant Motores. The Bank was put upon notice and upon inquiry, and the loan advances made by it to the bankrupt set forth in its petition for reclamation were made at its peril. The Bank then was in a position to protect the interests of appellant Motores and at the same time to protect itself in the loaning of the money to the bankrupt by first demanding of the bankrupt that the unpaid drafts then in the possession of the Bank for the purchase price of said automobiles be paid out of the funds loaned by the Bank to the bankrupt.

IV.

The failure of the Bank to have the drafts paid as stated in the preceding specification was an act of negligence on the part of the Bank and Motores was an innocent party within the meaning of Section 3543 of the California Civil Code; said negligent act of the Bank infringed upon the lawful rights of appellant Motores within the meaning of Section 3516 of the Civil Code; appellant Motores should not suffer by said negligent act of the Bank within the meaning of Section 3520 of the Civil Code. Therefore, the Bank is estopped from claiming a lien on the automobiles in question superior to the title of appellant Motores.

V.

Apart from the foregoing, the automobiles in question were obtained by the bankrupt from appellant Motores upon false and fraudulent representations of facts as alleged in the cross-petition of appellant Motores and appellant parted with the possession of said automobiles and delivered the paper muniments of title to the bankrupt relying upon and believing in the truthfulness of said representations and the Bank therefore cannot be said to stand in the position of an innocent purchaser.

VI.

The testimony bearing upon said false and fraudulent representations made by the bankrupt to appellant Motores (though made in the absence of the Bank) was relevant on the issue of the ownership

of the automobiles in appellant Motores and same was binding upon the trustee and the Bank and the Court committed prejudicial error in striking and rejecting said testimony.

VII.

While the Referee and the District Judge on review correctly found and determined that the transaction between the bankrupt and appellant Motores was a cash transaction and that the non-payment of the drafts upon their presentation revested title to said automobiles in appellant Motores, the Referee and the District Judge on review committed prejudicial error in ruling that said transaction was not a cash sale insofar as the appellee Bank of America was concerned.

VIII.

The findings of the Referee as confirmed by the District Judge are not sustained by the record as specifically pointed out in Paragraph VIII of the petition for a review and the specific finding of the Referee (Paragraph 16) that the Bank had no actual knowledge that the bankrupt's drafts were unpaid at the time the Bank made its loans to the bankrupt is clearly refuted by the undisputed evidence in the record.

IX.

Conclusions of Law

That the Court erred in its conclusion of law (No. 1) that Motores is estopped to contend that it has a right to the vehicles or their proceeds superior to that of the Bank.

X.

That the Court erred in failing to make the following conclusions of law:

(a) That the physical delivery by Motores to the bankrupt of the vehicles together with the simultaneous delivery of the paper muniments of title to said vehicles, and the payment of the purchase price for said vehicles were all concurrent conditions and mutually dependent acts, and the transaction not only between Motores and the bankrupt but also between Motores and the Bank was a cash transaction.

(b) That the bankrupt's drafts (Exhibits A, B, C, D, and E) constituted only a conditional payment of the purchase price. The failure of the bankrupt to have said drafts honored and paid upon their presentation to the bank for payment has vitiated the sale transaction ipso facto and ab initio, irrespective of the bankrupt's pretended honest intentions when the drafts were issued. The payment of the purchase price by worthless drafts or checks is tantamount to payment by counterfeit money in specie.

(c) That when a check or draft is issued to the seller for the purchase price, it is not a sale on credit, since the seller has a right to believe and rely that the purchase check or draft is not worthless and that it would be paid upon presentation.

(d) That the Bank was not a bona fide purchaser of the vehicles, it stood in the shoes of the bank-

rupt, and the Bank could acquire no better title than the bankrupt. The failure by the bankrupt to honor and pay its drafts rendered the sale a nullity, and the bankrupt had no interest in the vehicles which it could mortgage or pledge, and the Bank had no lien on the vehicles.

(e) That the acceptance by Motores of the bankrupt's purchase drafts cannot be tortured into an estoppel on the part of Motores against the Bank. That the drafts were deposited by Motores in the regular course of business, that the Bank had actual knowledge that the drafts were unpaid, and that title to the vehicles was thereupon revested in Motores. That the flooring financing of the bankrupt contemplated and included the payment of the drafts, and that the flooring financing and the payment of the drafts all constituted a part and parcel of the same transaction, and that the Bank was charged with knowledge thereof.

(f) That the Court erred in not concluding as a matter of law that the Bank was charged with notice and put upon inquiry because of the fact that unpaid drafts were in its possession at the time it advanced money upon its flooring contract agreements.

XI.

That the findings of the Court are contrary to and in conflict with the evidence in the case.

XII.

That the conclusions of law made by the Court are contrary to the law of the case.

XIII.

That the order of the Court granting relief to the Bank is contrary to the law and the evidence.

XIV.

That the Court erred in sustaining objection to certain evidence offered by Motores and in overruling certain objections made to evidence offered by the Bank.

Dated: June 29, 1954.

/s/ ERNEST R. UTLEY,
Attorney for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

The record designated by the appellant Motores de Mexicali, S. A., as material to the consideration of this appeal and to be printed is as follows:

1. Names and addresses of attorneys.
2. Debtor's petition involuntary bankruptcy.
3. Resolution attached to debtor's petition.
4. Order of adjudication.
5. Petition by Bank of America to reclaim property.

6. Notice of motion by Motores for leave to file answer and cross petition.

7. Answer of Motores, affirmative defense and cross petition.

8. Answer by trustee to order to show cause.

9. Stipulation to sell cars and to impound funds.

10. Stipulation to impound funds.

11. Memorandum of opinion by Referee.

12. Objection by Motores to proposed findings.

13. Findings of fact and conclusions of law.

14. Petition by Motores for review of Referee's order.

15. Certificate by Referee on review.

16. Notice of motion by Bank of America to dismiss petition on review.

17. Minute order of March 22, 1954.

18. Order denying petition for review.

19. Notice of appeal.

20. Transcript of testimony, beginning with line 17 at page 13 up to and including line 23, page 81.

21. Concise statement of points herewith filed.

22. This designation.

Dated: June 29, 1954.

/s/ ERNEST R. UTLEY,
Attorney for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1954. Paul P. O'Brien,
Clerk.

No. 14397.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOTORES DE MEXICALI, S. A., a corporation,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, *Appellee*, and E. A. LYNCH, Trustee of the Estate of Erbel, Inc., doing business as Bi-Rite Auto Sales, Bankrupt.

APPELLANT'S OPENING BRIEF.

ERNEST R. UTLEY,
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Los Angeles 13, California,

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FILED

AUG 21 1954

PAUL W. DEBRIEN
CLERK

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APPELLANT'S OPENING BRIEF.

Introductory Statement.

This is an appeal from the order and judgment of the Court made and entered on April 29, 1954, adopting and affirming the order of the Referee in Bankruptcy made and entered in this reclamation proceeding on January 27, 1954, and denying the petition of Motores de Mexicali, S. A. for a review of the aforesaid order of the Referee.

This appeal attacks only that part of the Referee's order which awards and orders payment to the Bank of America National Trust & Savings Association of the sum of \$8,262.87. This contest is one between Motores and the Bank, the Trustee is not a party to this appeal.

For convenience, the above named Bank will be hereafter referred to as "the bank" and at all times herein same will refer to the Wilshire-LaBrea Branch; appellant Motores de Mexicali, S. A. will be referred to as "Motores," and the Trustee in Bankruptcy as "trustee." Erbel, Inc. etc. will be referred to as "the bankrupt."

The transaction giving rise to the contest between the appellant and the bank was handled by the officials and employees of the bank in charge of the loan and collection departments of its Wilshire-LaBrea Branch. It is appellant's position that the transaction was handled by them negligently; that their negligent conduct was conducive to the perpetration of the fraud by the bankrupt on the appellant as alleged in appellant's cross-petition [R. 14-29]; that under Section 3543 of the California Civil Code as construed by the California decisions the bank "must be the sufferer"; that its asserted lien as alleged in its reclamation petition [R. 7-12] is void against appellant, *and the bank was estopped from disputing or denying appellant's title to the automobiles involved herein.*

Pleadings.

The bank's reclamation petition [R. 7-12] alleges in substance as follows:

1. That prior to bankruptcy the bankrupt executed and delivered to the bank trust receipt certificates covering the automobiles described in Schedule A attached to the petition [R. 7], and that the balance owing to the bank under these trust receipt certificates was the sum of \$23,363.00 [R. 8].

2. That prior to bankruptcy the bankrupt also executed and delivered to the bank trust receipt certificates

covering the seven automobiles described in Schedule B attached to the petition, and that these seven automobiles were sold by the trustee for the sum of \$6,599.00 [R. 8-9].

The reclamation petition prayed for an order directing the trustee to deliver to the bank the automobiles described in Schedule A and to remit to the bank the sale proceeds of the seven automobiles described in Schedule B in the above stated amount of \$6,599.00 [R. 10-11].

The cross-petition of Motores [R. 14-29] alleges in substance as follows:

1. That five of the automobiles covered by the bank's trust receipt certificates were the property of Motores, and that the bank's lien under its trust receipt certificates was void against Motores [R. 14-16].

2. That prior to bankruptcy an executory sales and purchase agreement was made between the appellant and the bankrupt under which the bankrupt agreed to purchase the five automobiles in question and to pay the purchase price thereof *in cash* [R. 18-19, 21-22].

3. That at the time of the sale the bankrupt gave to Motores five automobile purchase money drafts [Exs. A, B, C, D, E] *payable through the bank*, each labeled "purchase money draft" and each specifying the automobile sold and its purchase price [R. 19-20, 22-24].

4. That the five drafts were taken by Motores as conditional payment; that they were duly presented by Motores for payment in due course to the bank; that payment of said drafts was dishonored; that due to its insolvency the bankrupt was financially unable to meet payment of the drafts; *that the drafts were all worthless*,

and that Motores was an unpaid seller under Section 1772 of the California Civil Code [R. 20-21, 24-25].

5. That at the time of the sale the bankrupt falsely and fraudulently represented to Motores that the drafts will be paid upon their presentation to the bank and that it was solvent and financially able to meet payment of the drafts upon their presentation to the bank; that in reliance upon all and each of said representations and believing same to be true, Motores was importuned to deliver to the bankrupt physical possession of the five automobiles together with the paper titles thereto; and that it was expressly agreed that the vesting of title to the automobiles was conditioned upon payment of the purchase price and would become absolute only where and if the drafts were paid upon their presentation to the bank [R. 25-26, 27-28].

6. That the bank, where the drafts were presented for payment and dishonored, had knowledge of the above stated facts [R. 15]; that the bank *was negligent by* facilitating the bankrupt to defraud the appellant, *and that the bank was estopped* from impressing a lien upon the automobiles in question under its trust receipt certificates [R. 28] under Section 3543 of the California Civil Code.

It is to be noted that no responsive pleadings were filed by the bank to appellant's cross-petition, and the verity of the factual allegations therein set forth was not challenged by the bank's reclamation petition, or by the trustee's answer to the order to show cause [R. 29-31].

Jurisdictional Statement.

1st. On July 2, 1953, Erbel, Inc., dba Bi-Rite Auto Sales, filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of California, Central Division [R. 3], and was on the same day [R. 6] adjudicated a bankrupt.

2nd. On July 29, 1953, the bank [R. 7-12] filed a petition in said bankruptcy proceedings to reclaim certain automobiles and to recover from the trustee a sum in excess of \$500.00.

3rd. On August 3, 1953, Motores filed herein its answer, containing affirmative defenses, and its cross-petition [R. 14-29], in which it claimed the ownership of and title to five of the automobiles in question. The trustee likewise filed his answer [R. 29-31] to the bank's petition on the same day.

4th. A hearing upon the "three-cornered controversy" [R. 37] was commenced in the afternoon of August 13, 1953 [Findings, R. 59] and during the course of said hearing, two stipulations were entered into between the interested parties providing that the trustee proceed to sell the automobiles described in the bank's reclamation petition and to impound the sale proceeds subject to the orders to be made by the Referee in respect thereto [R. 32-36].

5th. After the hearing was concluded and submitted, the Referee filed his Memorandum of Opinion [R. 37-52]. The findings of fact and conclusions of law and order were prepared and proposed by the bank, pursuant to the Referee's direction [R. 59-71], and objections thereto were made by Motores [R. 53-59]. The findings and conclusions of law as prepared by the bank, with slight

amendments, were signed by the Referee on January 27, 1954 [R. 71].

6th. Motores filed its petition for a review on February 6, 1954 [R. 71-82] challenging that portion of the Referee's order ordering payment to the bank of \$8,262.87. Same was submitted on briefs on March 22, 1954, and the Court made its order [R. 88-89] on April 29, 1954, sustaining the Referee's order and adopting his findings of fact and conclusions of law. It is from this order of the Court that this appeal is taken.

Upon the above court orders, pleadings and on the facts hereinafter stated, this Court has jurisdiction of this appeal under the provisions of Section 24 of the Bankruptcy Act; the amount involved is in excess of \$500.00.

Facts.

Appellant, Motores, is a duly organized corporation under the laws of Mexico, having its principal place of business at Mexicali, Mexico.

It is engaged in the sale of new and used automobiles. Before the incorporation of the bankrupt, its manager, Erwin G. Resnick, had bought used automobiles in Mexicali from Motores at wholesale and paid for same by check [R. 137]; and he was well known to Luken, the manager of Motores, before the organization of Resnick's bankrupt company [R. 128-129].

After the bankrupt was incorporated and in the latter part of 1952, Mr. Luken, the manager of Motores, had a conversation at Mexicali with Mr. Resnick, the manager of the bankrupt, with reference to the *selling* to the bankrupt of used automobiles. This conversation

took place in the presence of Ray Cowan and one Mr. Rodriguez, the car buyer for the bankrupt [R. 129-131].

Mr. Resnick there told Mr. Luken of the formation of the bankrupt company, and of his partnership with Mr. Cowan, and that they had all kinds of money; that they had Bank of America flooring plus a continuing guarantee of William D. Cowan, the father of Ray Cowan, of \$100,000.00 at said bank [R. 140]; that the drafts for the purchase of automobiles will be paid immediately upon presentation to the bank; that the drafts would be considered the same as a check and they would be paid immediately upon presentation to the bank [R. 129-139 to 143-147]. Mr. Luken, who had done business before with Mr. Resnick, believed in and relied upon the representations made by Resnick with respect to their financial ability to pay immediately upon the presentation of drafts to the bank, and that the same would be so paid.

Resnick [R. 140] also told Luken that the titles to the automobiles were needed in order to bring the cars across the border into California, and to secure California registration so that with the pinks they could floor the cars with the bank to *pay the drafts immediately upon their presentation to the bank*. The sales were at all times intended as cash sales; and as each car was purchased, the bankrupt issued, over the signature of Mario Rodriguez, who was authorized by the bankrupt to sign drafts and to purchase the cars [R. 128 and 148-149], a purchase draft on the printed form of the bankrupt. The drafts on their face each fully described the automobile purchased and specified the purchase price thereof [R. 148]. *The drafts were all presented for payment through the Wilshire and La Brea branch of the bank, the same branch which floored the automobiles in question.*

The previously issued purchase drafts were all paid promptly upon presentation to the bank [R. 130] until in March and April of 1953, when the drafts in question were dishonored.

The bank had floored automobiles for the bankrupt [R. beginning p. 109] commencing sometime during the latter part of 1952; and same continued through the transactions here involved. The loans herein involved were made by the bank to the bankrupt, under its flooring arrangement, on the automobiles in question *while, and despite the fact that the unpaid purchase drafts in question were in the bank's possession.* [See testimony of Mr. Fort, beginning at p. 108 of R.]

Mr. Fort admitted upon cross-examination [R. 119-120] that he personally knew on May 19, 1953, that the drafts had not been paid; yet on this very day, Mr. Fort, assistant cashier of the bank, made a loan to the bankrupt of \$4,925.00, which included the flooring of the two Chevrolets in question [R. 114]. *The bankrupt was not credited with this money until two days later, May 21st.*

The above admissions were elicited on cross-examination, while on direct examination [R. 116] Mr. Fort denied knowledge that the cars in question had not been paid for. We reserve further comment upon this subject until later on in the brief.

It is singular that the bank did not see fit to have the officials of its collection department testify at the hearing.

Possession of the 1951 Buick and the 1950 Oldsmobile in question were obtained from Motores by the bankrupt on March 6, 1953 and the two Chevrolets and the 1952 Buick on April 2, 1953. This was done upon the issuance

to Motores of the purchase drafts Exhibits A, B, C, D and E. When Motores delivered the three additional cars to Mr. Rodriguez on April 2, 1953 it was not aware that the previously issued March drafts [Exs. A and B], had been dishonored [R. 142-143]. In fact, Resnick told Luken on this very day that they had been taken care of.

The drafts Exhibits A and B were both dated March 6, 1953 which were presented for payment, in the regular course of business, to the bank on or about March 11, 1953, and were dishonored; on or about March 18, 1953, said two drafts were returned unpaid to the bank in Mexicali, Mexico, where Motores maintained its account; on March 28, 1953 the aforesaid drafts were forwarded for collection by Motores' bank to the aforesaid branch of the Bank of America and after again being dishonored, were returned to Motores' bank on May 19, 1953; Motores had no knowledge of and was not aware [R. 142-147] that the drafts issued under date of March 6, 1953, had been dishonored at the time it accepted the three drafts under date of April 2, 1953, Exhibits C, D, and E; the drafts, Exhibits C, D, and E, were presented for payment, in the regular course of business, to the said bank on or about April 7, 1953, the same were dishonored, and were returned unpaid on May 19, 1953.

When the drafts were issued and delivered to Motores, and as a part of the same transaction, it delivered to the bankrupt the Mexican registration papers and bills of sale to the automobiles described upon the face of the drafts for the purposes hereinbefore enumerated.

MOTORES TESTIFIED WITHOUT CONTRADICTION THAT IT WOULD NOT HAVE PARTED WITH THE AUTOMOBILES IN QUESTION AND WITH THE MUNIMENTS OF TITLE THERETO HAD IT KNOWN THAT SAID DRAFTS WOULD NOT BE PAID IMMEDIATELY UPON PRESENTATION TO THE BANK [R. 141].

The dates upon which the bank made the loans to the bankrupt under the flooring arrangement upon the five cars in question are:

1951 Buick—April 6, 1953.

1950 Oldsmobile—April 8, 1953.

1952 Buick—May 9, 1953.

Two 1952 Chevrolets—May 19, 1953.

On all of the above dates the unpaid drafts were in the collection department of the same bank, who loaned the money to the bankrupt under the flooring arrangement. Drafts, Exhibits A, B, C, D, and E, each accurately described upon its face the automobile sold and specified the amount of the purchase price, and showed upon its face *that it was an automobile purchase draft*.

The 1952 Buick was sold by the bankrupt to one Mays and the trustee has realized from the sale of said Buick cash in the sum of \$2,441.00; the Buick was then traded by Mays for a 1947 Mercury, which was thereafter sold by the trustee for a cash realization of \$400.00.

At the same time when the bank loaned money upon the 1952 Buick, it also made a loan upon the 1950 Chevrolet, which was subsequently sold by the trustee. There was realized by him from said sale the sum of \$1,341.32, and all of the aforesaid sums of money aggregating \$3,782.32, are now in his possession and constitute the proceeds of said vehicles.

Pursuant to stipulation of the interested parties herein, the trustee was empowered to sell the remaining automobiles and impound the funds to await the decision of the Court, the total amount of cash herein involved being \$10,355.14; the stipulation calling for a reasonable part of the proceeds to cover costs of sale, the rights of the respective parties to attach to the proceeds of said sales in the same manner and to the same extent as such rights attached to the said motor vehicles themselves.

There are other facts which we may desire to mention later in this brief, however, we believe the above stated facts give this Honorable Court a rather concise picture of the transaction.

Evidence Excluded and Stricken by the Referee.

1. Resnick, the manager of the bankrupt, was not permitted to answer the question put to him on cross-examination that he told Motores at the time the bankrupt purchased the three cars on April 2, that the drafts issued in March had all been paid [R. 130-132].

2. The testimony of Motores bearing on the bankrupt's fraud that enabled the bankrupt to acquire the automobiles in question without payment was stricken by the Referee and the District Judge on the ground that it was not binding on the bank [R. 138-139].

3. The testimony of Rodriguez to the same effect was also stricken by the Referee and the District Judge for the same reason, as was the testimony of Resnick [R. beginning with p. 147]. (See bank's motion to strike [R. 152] and the ruling of the Court granting this motion [R. 50-52; 70-71].)

Appellant contends that this testimony was binding on the bank because it served as corroborative proof of the *expressed intention* of Motores and the bankrupt that the sale transaction was a cash transaction, and not a credit transaction. It was also admissible upon the question of the bankrupt's fraud. (It is axiomatic that the hearsay evidence rule does not come into play if the issue is directed to proof of *intention*.) This testimony also fortified appellant's contention that the bank, *whose negligence was emplaced in the bankrupt's fraud, was estopped from denying that the sale transaction was a cash transaction, and from denying Motores' title to the five automobiles.*

Specifications of Error.

I.

The Court erred in failing to find and conclude that the delivery of the drafts in question, Exhibits A, B, C, D, and E, constituted conditional payments of the purchase price; that the failure to have said drafts paid upon their presentation in due course of banking business vitiated the sale transaction *ipso facto* and *ab initio*; that there was no sale, and that the title to said automobiles was thereupon vested in Motores by operation of law.

II.

The Court erred in failing to find and conclude that the bank had knowledge and notice by and through its employees in the collection and loan departments, that said purchase drafts were worthless and that title to said automobiles was vested in appellant, Motores; that when the bank floored the automobiles and made the loans to the bankrupt, it had knowledge of and was charged with notice that the automobiles were unpaid for, and that title

to the automobiles was vested in appellant, Motores; that the bank was put upon notice and inquiry, and the loan advances made by it to the bankrupt upon the automobiles in question were made at its peril; that the bank was in a position to protect the interests of appellant, Motores, and at the same time to protect itself in the loaning of the money to the bankrupt by first paying the drafts then in its possession or making the loan checks payable to Motores and the bankrupt; that the bank's failure to have the drafts paid out of the loans was a negligent act on the part of the bank, and Motores was an "innocent person" within the meaning of Section 3543 of the California Civil Code; and that the bank *is estopped from claiming a lien* on the Motores property.

III.

The Court erred in failing to find and conclude from the evidence that the automobiles in question were obtained by the bankrupt from Motores upon the bankrupt's false and fraudulent representations of facts as alleged in the cross-petition of appellant, Motores; that Motores parted with the possession of said automobiles and delivered the paper muniments of title to the bankrupt relying upon and believing in the truthfulness of said false representations, and that the bank was not an "innocent person" within the meaning of Section 3543 of the Civil Code of California.

IV.

The testimony bearing upon the aforesaid false and fraudulent representations made by the bankrupt to Mr. Luken, the manager of Motores (albeit made not in the presence of the bank) was binding on the bank for the reasons stated under the heading of "Evidence Excluded and Stricken" hereinabove.

V.

Although the Referee, and the District Judge on review, found and determined that the transaction between the bankrupt and Motores was “intended that the sales be sales for cash” [Finding XVII, R. 67], the Court erred in failing and refusing to rule that the transaction was a cash sale *both as to the bankrupt and the bank* and that the non-payment of the drafts upon their presentation had vested the title to said automobiles in Motores; that the sale was a conditional sale under Section 1762, Civil Code, and that the delivery of the cars and the muniments of titles and the payment of the drafts were concurrent conditions. [See objection to findings, II, R. 54.]

VI.

The findings of the Referee as confirmed by the District Court are repudiated by the record as specifically pointed out in Paragraph VIII of the petition for a review [R. 74-80] and in appellant’s objections to said findings. [R. 53-59.]

VII.

The Court erred in concluding as a matter of law that Motores was estopped from claiming that it had title to the vehicles or their proceeds superior to the bank.

VIII.

That the Court erred in failing to make the following conclusions of law:

(a) That the physical delivery by Motores to the bankrupt of the vehicles together with the simultaneous delivery of the paper muniments of title to said vehicles, and the payment of the purchase price thereof, were all concurrent conditions and mutually dependent acts, and the

transaction was a cash transaction not only between Motores and the bankrupt *but also between Motores and the bank.*

(b) That the bankrupt's drafts [Exs. A, B, C, D, and E] constituted only a conditional payment of the purchase price. The failure of the bankrupt to have said drafts honored and paid upon their presentation to the bank for payment has vitiated the sale transaction *ab initio*, irrespective of the bankrupt's pretended honest intentions when the drafts were issued. *The payment of the purchase price by worthless drafts or checks is tantamount to payment by counterfeit money in species.*

(c) When a check or draft is issued to the seller for the purchase price, it is not a sale on credit, since the seller has a right to believe and rely that the purchase check or draft is not worthless and that it would be paid upon presentation.

(d) That the bank was not an "innocent person," and that it could acquire no better title than the bankrupt. The failure by the bankrupt to honor and pay its drafts rendered the sale a nullity, and the bankrupt had no interest in the vehicles which it could mortgage or pledge, and the bank's lien on the vehicles was void.

(e) That the acceptance by Motores of the bankrupt's purchase drafts cannot be tortured into an estoppel on the part of Motores against the bank. The drafts were deposited by Motores in the regular course of business, and the bank had actual knowledge that the drafts were unpaid, and that title to the vehicles was thereupon vested in Motores. That the flooring financing of the bankrupt *contemplated and included the payment of the drafts*, and the flooring financing and the payment of the drafts all

constituted a part and parcel of the same transaction, and the bank was charged with knowledge thereof.

(f) That the court erred in not concluding as a matter of law that the bank was charged with notice and put upon inquiry, since the unpaid drafts were in its possession at the time it made the loans under its flooring arrangement with the bankrupt.

IX.

The findings of the Court are contrary to and in conflict with the evidence in the case.

X.

The conclusions of law made by the Court are contrary to the law of the case.

XI.

The order of the Court granting relief to the bank is contrary to the law and the evidence.

XII.

The Court erred in sustaining the bank's objection to the following question propounded to Erwin J. Resnick:

“Q. And you recall telling him that they had been?” [R. 130-131.] [See Court ruling at p. 132.]

The above quoted question referred in context to the fact that Resnick had told Luken on April 2, the date the last drafts were given, that the March drafts had all been taken care of.

XIII.

That the Court erred in granting the bank's motion to strike the testimony, and in ordering the testimony of Luken, Resnick and Rodriguez stricken [R. 70-71].

ARGUMENT.

POINT ONE.

The Sale of the Automobiles Here Involved Was a Cash Sale. The Delivery of the Automobiles and the Muniments of Title and the Payment of the Drafts Were Concurrent Conditions. The Sale Was a Conditional Sale Under Section 1762 of the Civil Code of California. The Bank Was Estopped From Denying Motores' Title.

The Referee in his Memorandum Opinion, in commenting upon the law of the case [R. 43] stated as follows:

"1. In View of All the Circumstances, Title Did Not Pass From the Mexican Corporation to the Bankrupt. . . .

The evidence indicates that the Mexican corporation and the bankrupt contemplated a sale for cash. It is true that no checks were given, but the drafts given were intended to be of a similar nature. The bankrupt represented and the Mexican corporation understood that the drafts would be paid upon their presentation to the Bank.

The California law seems clear that where the terms of sale are cash, the title to the goods does not pass until payment of the price. *Puritas Coffee & Tea v. De Martini*, 56 C. A. 528, 206 P. 98. And where a check is give upon delivery, the sale is one for cash, and if the check is dishonored the title to the goods, as between the parties remains in the seller. *South San Francisco Packing and Provision v. Jacobsen*, 183 C. 131, 190 P. 628; *Peerless Motor Co. v. Sterling Finance*, 139 C. A. 621, 34 P. (2) 738; *Clark v. Hamilton Diamond*, 209 C. 1, 284 P. 915. See to the same effect: *DeVries v. Ellison*, D. C. Minn., 100 F. S. 781, affirmed C. C. A. 8,

199 F. (2) 677, (Iowa and Minnesota law); Engstrom v. Benzel, C. C. A. 9, 191 F. (2) 689, (Washington law); Johnson v. Robinson, C. C. A. 5, 203 F. (2) 135 (Texas and Oklahoma law). Where cattle are sold for cash and a draft is given for the purchase price, but the draft is dishonored, title as between the parties to the sale remain in the seller. Towey v. Esser, 133 C. A. 669, 24 P. (2) 853. We are not dealing here with a situation where a check or draft is given in absolute payment, Peerless Motor v. Sterling Finance, 139 C. A. 621, 34 P. (2) 738, in which event title passes even if the check or draft is not honored."

We agree that the above statement of the law is correct, but our complaint arises over the fact that the Referee did not follow through with this line of reasoning in his findings of fact and conclusions of law.

Believing that some extended quotations from the authorities herein relied upon may facilitate a clearer understanding of the argument that is to follow, same are set forth in the appendix.

We believe and urge that an automobile purchase draft in the form and language of Exhibits A, B, C, D, and E shows on its face a cash sale transaction under the reasoning in the following cases:

De Vries v. Sig Ellingson & Co., 100 Fed. Supp. 781, *affd.* in 199 F. 2d 677;

Engstrom v. Benzel, 191 F. 2d 689;

Engstrom v. Wiley, 191 F. 2d 684;

Johnson v. Robinson, et al., 203 F. 2d 135;

Towey v. Esser, 133 Cal. App. 669;

and other cases cited in appendix.

POINT TWO.

The Automobiles and the Muniments of Title Thereto Were Obtained From Motores Upon False and Fraudulent Representations, Which, Under the Law of California, Is Theft. Under Such Circumstances, Motores Never Parted With Title Thereto and Motores Was an "Innocent Person."

This fact is doubly emphasized when the last automobiles were purchased on April 2, 1953, and automobile purchase drafts issued as a means of payment. At this very moment, the March 6th drafts were in the bank's collection department unpaid, yet when Mr. Luken asked Mr. Resnick if all these drafts had been taken care of, Resnick's answer was that they had been. Resnick knew that his answer was false and upon this false statement he obtained three more cars.

In the early case of *Knapp v. Lyman*, 44 Cal. App. 283, Judge James, while a Justice of the Appellate Court, says that it is immaterial whether the automobile be obtained by larceny or by obtaining the property by false pretenses.

The case before this Honorable Court is only different factually from the *Knapp v. Lyman* case in that while the bank did see the pink certificates in the hands of the bankrupt, it made no inquiry as to how or why the bankrupt had obtained the muniments of title contrary to the terms of the drafts. It could have ascertained the true facts, which it could easily have done. Clearly, it was grossly negligent in not requiring the payment of the drafts covering the cars upon which it was loaning the money. It was negligent in accepting the pink certificates showing the bankrupt to be the owner, which was contrary to the facts shown upon the face of the drafts, without first making careful inquiry. It accepted them at its peril.

It must be remembered that the bank, upon its own motion, has caused the Referee to strike from the record any evidence which would show in any way the change in the procedure it followed under the terms of the draft. That so far as the record now stands as against the bank there was no change in the procedure to be followed under the terms of the drafts, yet, under the record, the bank without inquiry accepted the bankrupt as the owner of these cars, who, over its own signature was not supposed to have title until the cars were paid for in the amount shown in the respective drafts. Was this the act of a prudent and careful banker or was it downright carelessness?

It would seem that knowledge of possession of property accompanied by indicia of title is of little value to the bank, without proper inquiry, when it had in its possession the drafts given for the purchase price which clearly indicated that the delivery of the muniments of title was conditional upon payment of the purchase price.

See *Nathe v. Fred W. Gray Co.*, 75 Cal. App. 2d 682, at 686, and *Kamberg v. Springfield Nat'l Bank*, 103 A. L. R. at 306, above cited.

POINT THREE.

The Negligent Failure by the Loan and Collection Departments of the Bank to Honor the Drafts Out of the Funds Credited to the Account of the Bankrupt Under the Flooring Arrangement Was Imputable to the Bank. This Negligence Furnished Fertile Soil and Seed for the Bankrupt's Fraud on Motores, and the Bank Was Not an "Innocent Person" Under Section 3543 of the Civil Code.

This subject concerns the application of the well settled law of *respondeat superior and ostensible authority*. The opinion of the Referee indicates [see p. 49 of the R.] that this law was narrowly construed by the Referee.

In discussing this feature of the case, we do for the present put aside the fact (a) that Motores was precluded by the Referee to establish lack of negligence on its part and that it was an "innocent person" within the letter and spirit of Section 3543 of the California Civil Code, and (b) that the findings of the Referee that the bank was an "innocent person" was based wholly on testimony *which was stricken from the record on the bank's motion*. This point is discussed elsewhere in this brief. It suffices at this time to point out that the ruling of the Referee and of the District Judge on this issue does not in our judgment square with sound judicial reasoning and is somewhat quixotic.

Turning to the problem presented in the above captioned heading, we primarily draw the Court's attention to these uncontrovertible facts:

1. That the branch bank at which the drafts were made payable *was the same branch bank which loaned the bankrupt the moneys under the flooring arrangement.*

2. That the drafts were presented for payment *to the same branch bank*.

3. That it was *the same branch bank* that made the loans to the bankrupt under the flooring arrangement upon the automobiles clearly identified on the very face of the drafts.

4. That the unpaid drafts were in the possession of the same branch of the bank when the loans to the bankrupt were credited to its account under the flooring arrangement.

5. That the loan and collection departments of the bank were its duly authorized agents and employees in charge of the business of the bank.

6. That in each instance the transactions herein involved were had *with the bank* through its duly authorized agents and employees in the course of its regular banking business.

It seems to be well settled that the acts of the agents and the employees of the bank were binding on the bank and that their knowledge of the transaction in question was the knowledge of the bank itself.

This law seems to us to be elementary. The following California Code sections and California decisions are directly in point and establish the unbroken rule that knowledge of an agent is the knowledge of his principal when dealing with third parties. The referred to Code sections and decisions are cited in the appendix.

It would seem that it is Motores, and not the bank, who is the innocent party; and it is the bank who was negligent within the meaning of Section 3543 of the Civil Code of California. This is discussed more fully under A of this point.

COMMENT ON THE DECISIONS CITED BY THE
REFEREE AT PAGE 49 OF THE RECORD.

It is respectfully submitted that the decisions cited by the Referee at page 49 of the Record in support of his position that the law of *respondeat superior* and ostensible authority does not apply to bank employees who are not bank officers or who occupy a managerial capacity are not in point.

Globe Indemnity v. Union and Planters' Bank & Trust, 27 F. 2d 496, involved an action by the bank on a fidelity insurance policy issued under the Tennessee law, the bank claiming the right to recover damages sustained by reason of the fraud and dishonesty of one of its vice-presidents. *This case did not involve the application of the law of respondeat superior and ostensible authority.* The defense was predicated on the major premise that the fraud of the vice-president *was not covered by the terms of the fidelity policy* for the reason that his fraud was open and well known to some of the tellers of the bank. The Court ruled in effect that the fact that some of the tellers had knowledge of the vice-president's dishonesty did not constitute a waiver of the provisions in the insurance policy, and that the loss sustained by the bank was covered by the policy.

Hartford v. All Night and Day Bank, 170 Cal. 538, involved an action by a depositor against the bank for its negligence in failing to honor his check drawn on *his commercial account*. *The evidence was undisputed that the depositor had no commercial account.* The Court ruled that for this reason the teller was justified in returning the check with the endorsement "Has no account," and that the bank was not negligent. Plaintiff's conten-

tion that the check should have been nonetheless honored by the bank for the reason that he had sufficient money in his savings account was rejected by the Court as unsound for the principal reason that plaintiff's passbook had not accompanied the check as it was required by the bank rules and regulations.

State v. Brown County Bank, 112 Neb. 642, 200 N. W. 866, was a receivership proceeding, wherein the defendant's correspondent bank filed a claim for payment of a certificate of deposit. The evidence revealed that the officers of the defendant bank had knowledge of the facts surrounding the execution of the certificate of the deposit, that the claim of the respondent's bank was a secured claim, and that it was entitled to its payment out of the guaranty fund. This case did not involve the application of the law of *respondeat superior* or of the agent's ostensible authority: It is evident that the ruling of the Referee was based on the following *dictum* which had not the slightest bearing on the decision.

“As experienced bankers they know that credit slips pass through a large institution, such as claimant, *as part of the routine*, handled by clerks who have no part in the management of the bank, *and that in the regular course of business the entries would not be noted by the officers having the control and management of the institution*. The entries made by the clerks of claimant, who were merely charged with the ministerial duty of making entries, did not charge the bank with knowledge of the transactions, in the absence of any showing that these clerks imparted the knowledge they acquired to any officer of the bank, or that it was their duty so to do.” (Emphasis ours.)

It is respectfully submitted that the instant transaction was not a routine transaction and that it did not consist of mere bookkeeping entries. With all due respect to the Referee and to the District Judge, we fail to figure out the applicability of this dictum to the factual situation at hand.

A. The Bank Was Not an "Innocent Third Person." It Is Not a Bona Fide Purchaser Dealing on the Faith of Appearances. The Facts Within the Knowledge of the Bank Put It Upon Inquiry and Upon Notice. It Was Charged With Notice That the Automobile Purchase Drafts, Exhibits A, B, C, D and E, Fully Describing the Five Automobiles Here in Question Were Unpaid at the Times It Loaned Money Thereon: the Very Wording of the Drafts Disclosed a Cash Sale Transaction.

We do not contend that the bank knew of the conversations between Luken, Resnick and Rodriguez or of their prior dealings with each other.

We do contend, however, that the bank had notice and knowledge of the five unpaid drafts, Exhibits A, B, C, D, and E, which were held by it in its collection department on the days that the loans in question were made; that it had knowledge of all the written contents of said drafts, and that said drafts were given for the purchase of the five automobiles described in finding 9 [R. 63].

The bank knew:

1st. That the bankrupt was engaged in the business of buying and selling used automobiles. [See testimony of Mr. Fort, beginning R. 108, who was assistant cashier of the bank and whose duties were in connection with automobile financing. He handled the account of the bankrupt.]

2nd. That the purchases of automobiles were made by the bankrupt from Motores. Mr. Resnick testified [R. 128].

“Q. (By Mr. Utley): Now, you bought a good many automobiles from Mr. Luken of the Mexicali Motors prior to March and April of 1953, did you not? A. Oh, yes, sir.

Q. And I will show you Creditor's Exhibit C for identification, and in the purchase of those automobiles did you always give a purchase draft similar to that? A. Yes, sir.

Q. And do you recognize the signature on that draft? A. Yes, sir.

Q. Who is that? A. Mr. Mario Rodriguez, and, this is also one of our own drafts.

Q. It is one of your own printed drafts signed by Mr. Rodriguez? A. Yes.

Q. And he was authorized to sign those drafts? A. Yes, sir.

Q. Now, were all the automobiles purchased from (53) Motores de Mexicali purchased on drafts of that type? A. Yes, sir.

Q. And up until then—up until certain drafts that came in in March and April of 1953, were your drafts always paid promptly? A. Yes, sir.”

Mr. Resnick later testified [R. 135] that he bought as high as 40 or 50 automobiles a month. He also testified, as noted above, that up until March and April of 1953, the drafts were always paid promptly.

3rd. That the bankrupt purchased said automobiles during this period of time by means of an “Automobile Purchase Draft” signed by Bi-Rite Auto Sales and payable through the Wilshire-La Brea Branch of the bank.

[See testimony of Resnick above quoted. Also the testimony of Mr. Luken beginning at R. 137.]

4th. That the five drafts in question were not paid promptly, as had been the custom prior to March, 1953, and that said five drafts were still in the bank, unpaid, at the times of the bank's loans upon these five automobiles. [See findings 2, 3, 4, and 5; R. 60, 61, 62. See also testimony of Mr. Fort, beginning R. 108, and particularly note R. 120-121 and 114.]

5th. That the drafts stated upon their face that certain documents (the muniments of title to the automobiles) would be enclosed; that contrary to this statement, however, these documents were not enclosed, but the bankrupt presented the same to the bank at the time it applied for the loan, that these drafts called for the delivery of the ownership certificate, the registration card and the Bill of Sale to the purchaser upon the payment of the draft.

6th. That Mr. Fort, the bank officer who made the loan upon the two 1952 Chevrolets in question [R. 114] admitted [R. 120-121] that he personally knew that the drafts were being returned, unpaid, on the day that the loan on these two cars was made (May 19, 1958); that the bankrupt was not credited with this loan of \$4,925.00 on its account until May 21, 1953 [R. 114]. This admits of actual knowledge on the part of Mr. Fort.

Erroneous Findings.

In the light of the above facts, the Court clearly erred in finding 12 [R. 65] "that the bank had *no knowledge* that Motores and the bankrupt intended the sale of the vehicles to be cash sales." (Emphasis ours.)

The fact that the bank had knowledge that the purchase price had not been paid charged it with notice that the unpaid draft rendered the sale void.

Furthermore, the fact that the giver of the worthless draft appeared at the bank with the muniments of title to the automobiles in question when the unpaid draft stated in plain language that these documents would accompany the draft and be delivered to the maker of the draft upon payment of same, would present facts and circumstances so cogent and obvious that to remain passive would amount to bad faith. It would seem that any prudent person would question the reason for the variance between the directions in the draft and what was actually being done for fear the muniments of title presented might be stolen and/or obtained by trick and device or under false pretenses or representations. In fact they were obtained under false representations.

Contrary to finding 15 [R. 67] had the bank inquired of Motores it would have been advised of this fact as Mr. Luken testified.

That the drafts were to be paid immediately upon presentation, the same as a check. Also that Resnick told him on April 2, that all drafts had been taken care of, and upon the strength of this statement Luken let him have more cars.

That after they started with Bi-Rite [R. 139] he had a conversation with Resnick with respect to selling him cars; that Cowan and Rodriguez were present in Luken's office at Mexicali when the conversation took place in the

late part of 1952 or early part of 1953 [R. 140]; that Resnick told him that he was in partnership with Mr. Cowan and they had all kinds of money and Mr. Cowan had put up a guarantee with the bank, that they were going to buy the cars with those drafts and the drafts would be paid immediately on getting to the bank. "He told us they needed the titles in order to bring the cars across the border, bring them into California, and then take those papers into the Highway Patrol or the Registration Department here and get the pink slip, and with the pink slip they can floor the cars with the bank and *pay the drafts immediately upon presentation to the bank.*" That Luken believed the representations Resnick made with respect to "their financial ability to pay upon presentation, as he had done business with him before. That after being so informed Luken gave Resnick the title to the cars."

"Q. If you had known that the drafts would not be paid immediately upon presentation, would you have parted with title to the cars? A. No, sir, because that is one thing I explained to him very clearly. We wouldn't give the titles unless we get the money." [R. 141.]

Resnick told Luken [R. 141] that he could consider the drafts the same as a check "and they would be paid immediately upon presentation to the bank," "they would be paid as soon as they were presented to the bank" [R. 142.]

Luken further testified [R. 142] that at the time he received the April drafts, he did not know that the two March drafts had not been paid. That the drafts had

been paid before. That he would not have parted with the title of the automobiles upon any other condition than prompt payment upon presentation. That “until we get this, that was the only time I knew that they were unpaid.” [R. 143.]

That Luken saw Mr. Resnick on April 2d at the time “this last bunch of drafts were issued” and had a conversation with him [R. 146] at that time as to whether or not all the March drafts had been paid. And “Mr. Resnick said that he wanted to buy more cars, and I asked him how he was with the drafts. He said that everything had been taken care of. So that is why I didn’t mind selling him more cars.” [R. 147. See also testimony of Mr. Resnick at bottom of R. 130-131 in so far as he was permitted to testify.]

In the light of this testimony, if the bank had informed Mr. Luken that Resnick, in behalf of the corporation, was trying to borrow money on the cars sold in April and that neither the March 6th or April 2 drafts had been paid, is it not reasonable to assume that Luken would have informed the bank that money could only be borrowed upon the cars if the drafts were first paid?

Mr. Resnick’s testimony is substantially the same as Luken’s.

If this testimony had not been improperly stricken by the Court, what basis in the evidence is there for finding 15 [R. 67]?

POINT FOUR.

The Court Erred in Granting the Bank's Motion to Strike the Testimony of the Conversation Between Mr. Luken, Manager of Motores, and Mr. Resnick, Manager of the Bankrupt as Well as the Testimony of Mr. Rodriguez, the Buyer for the Bankrupt.

The Court also erred in its refusal to permit an answer to the following question:

“Q. And do you recall telling him that they had been?” [R. 131.]

Erwin G. Resnick was first called as a witness by Motores, under Section 21-j [R. 127] of the Bankruptcy Act. He testified in part as follows:

“Q. Well, any of the money that you got from the flooring of those cars didn't go to pay the drafts, did it? A. No.

Q. Now, do you recall along about April 2nd when you came down to Mexicali to purchase a number of cars from Mr. Luken of the Mexicali Motors? A. Well, I don't recall the exact date. I know I went down to Mexicali.

Q. At the time you were there do you recall his having asked you if all the drafts for the month of March had been taken care of? A. Yes.

Q. And you recall telling him that they had been?” [R. 130-131.]

It will be observed that to the last question, bank's counsel made the following objection:

“Mr. Fabian: I object to that on the ground that it is immaterial to any of the issues before this Court as to the (56) title to the vehicles.” [R. 131.]

After some argument, the Court said:

“I think you had better drop that line unless you can connect it with the bank in some way.” [R. 132.]

Aside from the fact that the above testimony was all erroneously stricken [see motion of bank’s counsel to strike, the Referee and counsel’s remarks [R. 152]. See also findings and order R. 70, par. 6; R. 71, par. 5], it was prejudicial error to refuse the right of Motores to have an answer from Resnick as to whether or not he told Mr. Luken that all drafts for the month of March had been taken care of.

Mr. Resnick admitted upon examination that he was asked this question by Mr. Luken when he went to buy more cars and issued more drafts on April 2nd, but Motores was not permitted to find out what his answer was. Mr. Luken testified [R. 147] that he asked Mr. Resnick this question on April 2nd and Resnick’s answer was that “everything had been taken care of. So that is why I didn’t mind selling him more cars.”

The bank by its objection above referred to takes the position that it is immaterial whether or not Mr. Resnick was able to get possession of both the automobiles and muniments of title thereto described in the April 2nd drafts by telling Mr. Luken an absolute falsehood, to-wit: that all March drafts had been paid or taken care of.

Isn’t it material to the issues in this case whether or not Mr. Luken, manager of Motores, relying upon a false and fraudulent representation of Resnick parted with the possession and muniments of title to the automobiles described in the April 2nd drafts, or whether he parted with this property knowing the true facts?

See:

Nathe v. Fred W. Gray Co., 75 Cal. App. 2d 682 at 686;

Kamberg v. Springfield Nat'l Bank, 103 A. L. R. 306.

It is obvious from the record [see Motores' objections to findings R. 53; also Referee's directions R. 52], that counsel for the bank prepared the findings which were signed by the Court. Note particularly how Finding 12 [R. 65-66] tries but fails to bring home knowledge to Motores of the unpaid March drafts. Does not this finding clearly show that the bank and the Court thought this an important and material element in the case? Yet, the bank tried and succeeded in closing the lips of Mr. Resnick when he was ready to confirm Mr. Luken's statement that he had told Mr. Luken that all March drafts had been taken care of. This, of course, would be clearly a false statement upon the strength of which the bankrupt got possession of the 1952 Buick and the two Chevrolet cars [R. 63, finding 9] from Motores, and the bank through Mr. Fort loaned \$4,925.00 on the two Chevrolets [R. 114] at a time Fort knew the drafts were being returned unpaid [R. 120].

Furthermore, would not Resnick's answer to this question have shed considerable light upon whether or not the bankrupt intended to fulfill the promise to pay the drafts immediately upon presentment at the time such promise was made. [See finding 13, R. 66, which is based entirely upon the stricken evidence.]

The only possible evidence which could have been the basis for the finding of the Court that "the bankrupt intended to fulfill his promise at the time it was made"

[see finding 13, R. 66], was the self-serving declaration of Resnick that he intended to pay the drafts at the time they were issued [R. 135]. *And this testimony was stricken.*

This finding, above quoted, of good faith on the part of the bankrupt was made notwithstanding the fact that we were refused the right by the court over the bank's objection, to show by Resnick's own statement, that Resnick on April 2, and at the time the last three cars in question were delivered to the bankrupt, falsely stated to Luken that all March drafts had been taken care of. [See Motores' objection to finding 13, R. 57].

The Bank Has Gotten Itself, and the Court, in an Untenable Position by Presenting and Urging the Making of Findings of Fact Favorable to the Bank Upon the Testimony of Resnick, Luken and Rodriguez Which Has Been Stricken. Finding No. 9 [R. 63] Is Based Upon Stricken Evidence.

What evidence is there other than that stricken by the Court upon which to base a finding of the physical delivery of the automobiles and muniments of title thereto from Motores to the bankrupt?

The drafts upon the face thereof indicate and show that the ownership certificate, the registration card and the bill of sale would accompany the draft.

The drafts are designated "Automobile Purchase Draft" then after the date there is the following printed language:

"Upon presentation of this draft to the bank designated below FOR COLLECTION TOGETHER WITH the documents properly executed *indicated on the reverse hereof.*" Then follows the direction to pay to Motores the money designated in the draft—

On the reverse side is the following:

- “(x) 1. Ownership Certificate.....
- (x) 2. Registration Card.....
- (x) 3. Bill of Sale.....
- () 4. Lien Satisfied.....
- () 5. Plates or affidavit of Non-Operation.....”

So, in the absence of the stricken evidence, all we know, and insofar as the stricken evidence shows, all the bank ever knew was that the muniments of title were supposed to accompany the drafts which should have been sufficient to have put the bank or any prudent person upon inquiry and upon notice since the automobiles and the muniments of title could have been stolen. In fact, they were stolen under the definition of Section 484 of the Penal Code, since they were obtained under false and fraudulent representations and a phone call by the bank to Motores would have revealed this fact, and that the sale was a cash sale, and that it was understood that the drafts were to be paid immediately upon presentation to the bank, the same as a check, the finding 15 [R. 67] to the contrary notwithstanding.

See *Nathe v. Fred W. Gray Co.* and *Kamberg v. Springfield National Bank* above cited.

FINDING 10 [R. 64].

How did the Court know, in the absence of the stricken testimony, what the purpose of Motores was in delivering the Mexican registration papers and bills of sale to the bankrupt, etc? [See our objection to this finding R. 54-55-56, par. III.] Furthermore, the stricken evidence is

contrary to the above finding. Mr. Luken testified [R. 140-141]:

“Q. What if anything did he say to you with respect to your delivering him immediate title to the cars? A. He told us they needed the titles in order to bring the cars across the border, bring them into California, and then take those papers into the Highway Patrol or the Registration Department here and get the pink slip, and with the pink slip they can floor the cars with the bank and pay the drafts immediately upon presentation to the bank.

Q. And did you believe the representations he made to you with respect to their financial ability to pay upon presentation? A. Well, I believed him. We had done business with him before.

Q. And did you—after his telling you that, did you give him the title to the cars as well as— A. Yes, sir.

Q. If you had known that the drafts would not be paid immediately upon presentation, would you have parted with title to the cars? A. No, sir, because that is one thing I explained to him very clearly. We wouldn't give the title unless we get the money.”

Resnick testified [R. 134-135]:

“Q. And did you ever give Mr. Luken to understand why you wanted title to these cars when you got possession? A. So I could turn them into California title and floor them so I could pay them.”

If the cars were to be floored, it was for the express purpose of paying the drafts and no other purpose.

Without repetition, substantially the same argument can be used as to findings 11, 14, 15 and 17. There is a lack of any evidence to support these findings since the testimony of Resnick, Luken and Rodriguez has been stricken upon the motion of the bank.

The conclusion of law 6 of the Court [R. 70] is as follows:

“The motion of the Bank to strike the testimony relating to the conversations between the representative of Motores de Mexicali, S. A. and the representative of the bankrupt was proper and must be granted, so far as the Bank is concerned.”

and paragraph 5 of the Order [R. 71] reads as follows:

“That the motion of the Bank of America National Trust and Savings Association to strike the testimony pertaining to the conversations between the representative of the bankrupt and the representative of Motores de Mexicali, S. A. is granted.”

We submit that this includes the testimony of Erwin G. Resnick, beginning R. 127; the testimony of Mario Luken, beginning R. 137; the testimony of M. R. Rodriguez, beginning at R. 147.

We contend that all of this testimony was material and vital to the issues herein and that it was prejudicial error to strike the same from the record.

Wilcox v. Salomone, 118 Cal. App. 2d 704 at 711.

We re-emphasize that without this evidence many of the Court's findings favorable to the bank are wholly unsupported by any evidence whatsoever. If the bank is not bound by this evidence, how, may we ask, can they use it in support of its position?

We would gladly copy this evidence in the brief if it would serve any useful purpose, but as we view the situation, all of the testimony of the three witnesses above named was stricken and it can be as conveniently read from the record as from this brief.

Conclusion.

In conclusion we respectfully submit that the wording of these automobile purchase drafts plainly directed the bank to pay to Motores the amount named therein as the purchase price of the automobile described on the face of each draft when the drafts were presented to the bank "with the documents, properly executed, indicated on the reverse side hereof," which documents were, of course, the muniments of title to the automobiles described thereon.

The bank knew, by this direction, that *each draft was to be paid* upon it having evidence that title to the automobiles was available for the bankrupt. So even though these documents did not accompany the drafts the bank knew that the bankrupt had these muniments of title (whether obtained rightly or wrongly) and there remained nothing more for Motores to do, or no reason why the drafts should not be paid immediately, and there was every reason why the bank should have required the payment of the drafts before permitting the money, which it loaned upon the automobiles, to get beyond its control.

It is respectfully urged that the judgment herein should be reversed, and that the funds in question be ordered paid to Motores.

Respectfully submitted,

ERNEST R. UTLEY,

Attorney for Appellant.

APPENDIX I.

In *DeVries v. Sig Ellison & Co.*, 100 F. Supp. 781 (which case was affirmed by the Eighth Circuit Court of Appeals in 199 F. (2) 677) the facts disclosed that one Brackey, not a party to the action, on April 18, 1950, purchased 33 head of cattle from plaintiffs at an auction sale in Buffalo Center, Iowa, and gave his check on a Lake Mills, Iowa bank for the purchase price of \$5,567.77. In due course it was presented for payment to the bank on which it was drawn and on April 26, 1950, it was returned N. S. F. When the check was presented for payment, Brackey had on deposit a balance of \$12.62. Promptly after purchasing the cattle, Brackey took possession of them, loaded them in trucks and forthwith transported them to South St. Paul, Minn. where he delivered them to the defendant for sale on the market. The plaintiffs had sold livestock to Brackey on many occasions over a period of several years, but his checks before had never been dishonored. The defendant likewise had sold livestock for Brackey over a period of several years, and on April 19, 1950, sold the consignment here involved, collected the sales price and remitted the proceeds to Brackey. The defendant was without knowledge of any defect in Brackey's title, thus the defendant put both the cattle and the proceeds beyond reach of the plaintiffs.

The record appears to be silent as to whether or not Brackey delivered to the defendants a bill of sale, shipping order, or any evidence of ownership or that defendant made any request for such evidence.

The question presented in this case is whether the plaintiffs or defendants shall bear the loss.

The contentions of plaintiff in this case are very much the same as the contentions of Motores and the contentions of defendants are similar to the bank's contentions here.

After pointing out that the state law would control in the determination of the questions involved, the Court says at page 784:

“Where personal property is sold for cash on delivery and the purchaser pays by check on his bank, such payment is conditional, and the delivery of the property likewise is conditional; and, if the check on due presentation, is dishonored, the purchaser does not obtain title and the vendor may retake the property. A check is not payment when it is tendered by a debtor on his bank; it is a method of transferring the money from the debtor to the creditor. The delivery of the check and the acceptance of it are purely conditional acts, and if the check is dishonored, there is no accord and satisfaction of the debt. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is to the contrary. Indeed, the delivery of a check to seller by purchaser is a representation that it is good and will be paid on presentation.”

Judge Fee, speaking for this Court, in the case of *Engstrom v. Benzel*, 191 F. (2) 689, which involved the question of whether the subsequent payment (within four months of bankruptcy) of an N. S. F. check, given for the purchase of wheat, for cash, constituted a voidable preference, says at page 691:

“Delivery and payments are concurrent conditions and mutually dependent acts. The inference to be drawn from the fact that a sale of fungible personal

property is made is that there is a cash transaction. In this case, it was expressly stated by the agent of the buyer to be a sale for cash. While it is stated that conclusive evidence of intention to waive performance of the condition of concurrent payment is the fact that delivery has been made without receipt of cash, it must be clear that the intention of the parties is a question of fact. Where, therefore, payment is evaded by the purchaser upon delivery as a part of a cash sale, the seller is entitled to recover the goods because the buyer only has a contract right until the price is paid. If a check is taken, it is conditional payment only. If the check is deliberately drawn upon a bank where there is no account of the buyer, the fraud would vitiate the transaction. If the buyer had given counterfeit money in specie to the seller and delivery was made in reliance thereon before discovery, the situation would be the same. Where a check is received for the purchase price, the provisions of the Negotiable Instruments Act, as well as the Sales Act, must be considered.

A seller has a reasonable time under all the circumstances to deposit the check. If, upon presentation, there are no funds and the check is refused, the seller has not retreated from his original intention and he has not extended credit. The failure of the bank to have funds on January 18, 1947, might have been accepted as proof of fraud and by Benzel, and he might then have demanded the return of the negotiable instrument covering deposit of the wheat in the warehouse. The fault in not having funds on hand was that of Chemurgy."

See also the companion case of *Engstrom v. Wiley*, 191 F. (2) 684 where the facts are similar and the questions of law substantially the same.

The transaction in *Johnson, et al. v. Robinson, et al.*, 203 F. (2) 135 involved the sale of cattle (66 head for \$13,800.) sold and delivered in Oklahoma and immediately transported to Amarillo, Texas, and resold through a livestock auction company. A draft was issued in this case instead of a check and it was payable through a Texas bank. *The purchase-money draft in favor of the appellees was duly presented and payment refused.*

The livestock auction company had undoubtedly had business transactions before with the maker of the draft, one Johnnie Johnson, for when it sold the cattle for his account it applied *a portion* of the proceeds received from the sale upon a debt which he owed the company. The Court in this case held that appellants were not *bona fide purchasers*, and they did not become *innocent parties* by crediting *part of the proceeds of the sale* of appellees' cattle upon a pre-existing debt of the contemplated purchaser. The Court says:

"We have noted no difference between Texas and Oklahoma with reference to the rule of law that controls this case, which is that where goods are sold for cash and delivered, and the vendor takes the vendee's check for the price, which on presentment in due time is dishonored, the title does not pass and the vendor may reclaim the property from the vendee or from any other person who does not have any better equitable claim to it than the vendee."

CALIFORNIA LAW.

The case of *South San Francisco Packing and Provision Company v. Jacobson*, 183 Cal. 131 involved the sale of hogs in the State of Idaho where a worthless check was given and the hogs were finally resold in San Francisco.

In reversing the judgment of the Trial Court, the Supreme Court says:

“In effect, this sale was distinguished from a sale on credit, payment to be made, as is customary in similar commercial transactions, by check, as it was not agreed that the check was to be received as absolute payment, and the delivery of the goods also was conditional, and the check, upon due presentation, was dishonored, title to the hogs remained in the seller. In *Johnson etc. Co. v. Central Bank*, 116 Mo. 558, [38 Am. St. Rep. 615, 22 S. W. 813], it is held that a check given for the purchase price does not constitute payment until the money is actually received by the vendor unless it is otherwise expressly agreed. In *National Bank v. Chicago etc. Ry.*, 44 Minn. 224 [20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560] it is held that where goods are sold for cash on delivery, and payment is made by check, such check is, in fact, payment only when the cash is received on it, and that there is no presumption that a creditor takes a check in payment from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Such payment is only conditional or a means of obtaining the money. So, in *Hodgson v. Barrett*, 33 Ohio St. 63, [31 Am. Rep. 527], it is held that payment by check is a mere mode of making a cash payment; that it is conditional only, and if the check, upon due presentation, is dishonored the vendor may retake the goods from the purchaser.

There is nothing in this record indicating that the original sellers intended to accept Jacobsen's check as absolute payment. True, they were to accept a check in payment for the hogs, but this is the usual method in cash transactions of any magnitude, and it is employed as a matter of convenience and to obviate the necessity of handling and transporting large sums

of money with its attendant risks. In the case of *Comtoir d'Escompte v. Bresbach*, 78 Cal. 15, [20 Pac. 28], it is said that the language of the manager of the plaintiff bank in stating that a check which was subsequently dishonored, was accepted in payment of the debt sued upon should not be construed as signifying anything more the provisional or conditional payment presumed by law, and is no evidence of absolute payment.

[2] The title to the hogs, therefore, as between the parties to the sale having remained in the original sellers, it follows, we have no doubt, that the fund in the hands of the plaintiff, the purchaser from Jacobsen, constituting part of the purchase price, belongs to the original sellers, Taylor & Rosecrans; and we also entertain no doubt that so far as the attaching creditor is concerned it has no better right to the fund than Jacobsen himself. (*Ward v. Waterman*, 85 Cal. 491, 508 (24 Pac. 930).)

It follows that the judgment should be reversed and it is so ordered."

The case of *Towey v. Esser*, 133 Cal. App. 669 involved the sale of cattle from Santa Margarita Land and Cattle Company in San Luis Obispo County, California, to one Esser, a cattle buyer on or about June 17, 1931. Esser had bought cattle from the company three times before within the preceding two years. He was known to the ranch superintendent, Miller, who transacted the business with Esser on this particular occasion. Miller was authorized to sell the cattle for cash and he so informed Esser. A check was to be delivered to the seller when the cattle were weighed out. The cattle were weighed and Miller delivered to Esser a "brand certificate" which was necessary, under the law, for Esser to present to the railroad

company before it would accept the cattle for shipment. The cattle were driven by the seller to the loading corrals of the Southern Pacific Co., Santa Margarita, and on Saturday, June 20, 1931, were loaded into three cars and billed by Esser to Pacific Live Stock & Comm. Co., Union Stock Yards, Los Angeles, "for the account of John Schwab." Immediately after the cattle were loaded the amount of the purchase price was computed by Miller, and Esser delivered to Miller *a draft* for \$4,475.91 drawn on the consignee, Pacific Live Stock & Comm. Co., Union Stock Yards, Los Angeles, and signed "John Schwab by H. Esser." Esser then wrote out *a bill of sale*, in simple form, *which Miller signed and handed back to Esser.*

Shortly after receiving the draft, Miller forwarded same, with report of sale, to the San Francisco office of the company and the draft in due time was deposited in a San Francisco bank *for collection*. It arrived at the correspondent bank in Los Angeles the next day and at 2:10 P.M. of the same day was presented for payment to the Pacific Live Stock & Comm. Co. However, in the meantime, the cattle arrived and were resold about noon of that day by the Pacific Live Stock & Comm Co. and the proceeds of the sale attached by Towe in an action filed earlier in the day against Esser. The payment of the draft was refused.

The Trial Court awarded judgment in favor of Towe upon the legal theory that title to the cattle passed to Esser unconditionally and absolutely upon the simultaneous delivery of the cattle and the draft in Santa Margarita on June 20, 1931, despite the admitted fact that it was a sale for cash and that the draft given in lieu of cash proved to be utterly worthless.

In answer to the above, the Appellate Court says:

“In so holding the decision of the trial court, in our opinion, is, as appellant contends, in direct conflict with and contrary to the law declared in the case of *South San Francisco Packing & Provision Co. v. Jacobsen*, 193 Cal. 131 [190 Pac. 628], which involved facts almost identical with those of the present case. . . .

True, as pointed out by the court therein, where the seller expressly agrees to accept a check or bill or note, as absolute payment, title to the goods will pass upon the delivery of the goods and the acceptance of such check or bill or note, regardless of whether the paper is honored on due presentation thereof; but, as the court goes on to say, where goods are sold for cash on delivery and payment is made by check, such check is, in fact, payment only when the cash is received on it; and there is no presumption that the seller takes the check as absolute payment merely from the fact that he accepts it from the buyer, the presumption being, says the court, just to the contrary, citing *National Bank of Commerce v. Chicago, etc. Co.*, 44 Minn. 224 [46 N. W. 342, 560, 20 Am. St. Rep. 566, 9 L. R. A. 263]; *Hodgson v. Barrett*, 33 Ohio St. 63 [31 Am. Rep. 527]; *Johnson-Brinkham Co. v. Central Bank*, 116 Mo. 588 [22 S. W. 813, 38 Am. St. Rep. 615]. . . .

And so in the present case, the undisputed evidence shows that the sale of the cattle to Esser was to be a sale for cash as distinguished from a sale on credit, and that there was no understanding or agreement whatever that the draft given by Esser was to be accepted as absolute payment. On the contrary, the evidence shows it was taken merely in accordance with the custom followed in similar commercial transactions. Therefore, under the authorities above

cited, as between the parties to the sale, title to the cattle remained in the seller dependent upon the payment of the draft; and since the draft was dishonored the seller was entitled, as in the Jacobsen case, to the proceeds from the sale of the cattle as against the attaching creditor, who had no better right thereto than Esser himself would have had.

Moreover, in the Jacobsen case, *supra*, it was strongly indicated that if the check were given for the purpose and with the intention of perpetrating a fraud, the sale would have been void both as to Jacobsen and his attaching creditor. The court went on to point out, however, that after the issuance of the check and before its presentation for payment three days later, Jacobsen on two occasions had more than sufficient money on deposit to meet its payment, which the court stated, coupled with presumption of innocence and fair dealing, furnished some foundation for finding of the trial court against fraud. But in the present case the evidence shows without conflict that Esser clearly intended to and did in fact perpetrate an absolute fraud. He falsely represented that Schwab was the real purchaser of the cattle, he gave a spurious draft in payment thereof, purporting to be the draft of Schwab, and he shipped the cattle under Schwab's name to the Los Angeles⁸ commission house for the account of John Schwab; whereas, as stated, Schwab knew nothing whatever about the transaction. It is evident, therefore that the seller here established a much stronger case in its favor than did the sellers in the Jacobsen case."

The next California case, *Peerless Motor Co. v. Sterling Finance Corp.*, 139 Cal. App. 621, is an automobile case where one, Bowe, gave the owner of the automobile a

worthless check in payment of the automobile. The Court says, at page 624:

“The finding of the court that the plaintiff was the owner and entitled to the possession of the Peerless sedan automobile is adequately supported by the evidence. It appears that the title to the machine did not pass to Bowe. He was not the agent of the respondent. The machine was never actually delivered to him. The appellant is charged with notice that Bowe was not the owner of the machine. It is apparent the sale to Bowe was intended to be for cash, subject to the payment of his check which was dishonored for lack of funds. The certificate of ownership was issued to Jeanette M. Brady by the motor vehicle department of California without the knowledge or consent of the respondent. No *indicia* of title was executed or delivered by the respondent.

The question as to whether title to personal property passes to a proposed purchaser by the mere delivery thereof depends upon the intention of the parties, which is to be determined by the circumstances of the transaction. The mere acceptance of a check in payment for personal property, subject to the payment of the check, does not pass title when the check is subsequently dishonored and is not paid. (South San Francisco Pkg. etc. Co. v. Jacobsen, 183 Cal. 131 [190 Pac. 628]; Towey v. Esser, 133 Cal. App. 669 [24 Pac. (2d) 853].)

The appellant contends that the conduct of the respondent estops it from questioning the title to the Peerless sedan machine. We are of the opinion the record discloses nothing in the conduct of respondent with relation to the transaction which estops it from asserting title thereto.”

The case of *Clark v. Hamilton Diamond Co.*, 209 Cal. 1 involved the sale and delivery of a diamond ring. The ring was first sold by plaintiff to Harry Justice, who "fraudulently gave a worthless check in payment therefor". The ring changed hands several times either by trade or sale and finally one, Friedman, sold the ring to the defendant Cohen dba Hamilton Diamond Co. who purchased it without knowledge of the transaction between plaintiff and Justice. Cohen appealed from an adverse judgement claiming that he was a bona fide purchaser of the ring without knowledge of defect of title.

In short, the Trial Court found that the sale to Justice was a cash sale; that plaintiff did not waive immediate cash payment and gave no *indicia* or muniment of title to anyone when the sale was made; and in obtaining the ring, Cohen did not rely upon any evidence of title in his grantor. The Court says at page 3:

"From these findings it follows that the sale of the ring by plaintiff to Justice was, in effect, a sale for cash, as distinguished from a sale on credit, payment to be made, as is customary in similar transactions, by check. As it was not agreed that the check was to be received as absolute payment, the delivery of the ring to Justice was also conditional, and, the check being dishonored upon due presentation, title to the ring remained in plaintiff. (*South San Francisco Packing etc. Co. v. Jacobsen*, 183 Cal. 131, 135 *et seq.* [190 Pac. 628].) [2] It seems to be very definitely settled by that case and the authorities there cited that, as between the parties, upon the check being dishonored, the seller is clearly entitled to

resume possession of the property. *As between the original seller and third parties, the relation is to be determined by what the vendor has done or has not done.* In this case the plaintiff gave to Justice, the original purchaser, no INDICIA of title other than the possession of the property. He followed the due course of business in attempting to secure payment of the check, and took immediate steps to recover the ring upon learning that the check was worthless. Appellant has not made it appear, in fact, apparently does not claim, that he was injured by any delay on plaintiff's part. It is very clear from the findings that in this case the plaintiff did not transfer the possession of the ring to Justice with a power to dispose of it. Therefore, section 1142 of the Civil Code does not apply, and any executed sale by Justice, or those purporting to claim under him, does not transfer plaintiff's title to them. (Pacific Acceptance Corp. v. Bank of Italy, 59 Cal. App. 76, 80 [209 Pac. 1024.]) [3] There was no other INDICIA of ownership than mere possession. That was not enough. There must have been some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of the *innocent third persons dealing on the faith of such appearances.* (Levi v. Booth, 58 Md. 305 [42 Am. Rep. 332].)" (Emphasis ours.)

It will be observed that the cases cited above make no distinction between drafts and checks as a valid means of cash payment.

APPLICABLE CALIFORNIA CIVIL CODE SECTIONS.

Section 1762 C. C. provides:

“DELIVERY AND PAYMENT ARE CONCURRENT CONDITIONS. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession to the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.”

Section 1772 C. C. defines an unpaid seller as one: when

“(a) When the whole of the price has not been paid or tendered.

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.”

Section 1773 C. C. Prescribes remedies of an unpaid seller. As shown by the cases herein cited, said remedies are not exclusive, but are only cumulative.

Section 1781 C. C. speaks of the remedy of rescission. Said remedy is not exclusive, but is only cumulative. As shown by the authorities cited herein, the seller is entitled to restitution of his property without first exercising the right of rescission, if and when the buyer's purchase check or draft is dishonored.

APPENDIX II.

Doctrine of Estoppel.

The cases generally recognize the right of *innocent third persons* who acquire the property for value and *without notice* to rely upon estoppel against the seller where the seller has clothed the fraudulent purchaser with *indicia* of ownership in addition to possession of the property. *But such third persons must act in good faith.*

Nathe v. Fred W. Gray Co., 75 C. A. (2) 682.

Freitas v. March, 70 C. A. (2) 711.

De Vries v. Sig Ellingson & Co., 100 F. Supp. 781 at 787.

Clark v. Hamilton Diamond Co., 209 Cal. 1, at p. 3, para. (3).

Peerless Motor Co. v. Sterling Finance Corp., 139 C. A. 621 at 624.

The Court in the case of Nathe v. Fred W. Gray Co., 75 C. A. (2) 682 at 686 says:

“This is upon the principle that a party is not bound in transactions of this character either to anticipate or take precaution against the commission of a crime by which another may be deceived; that where it is through the instrumentality of a criminal act that the wrong is accomplished, it is the crime and not the negligent act which is the proximate cause or injury; and in such a case the maxim that where one of two innocent persons must suffer from the wrongful act of another, the loss must fall upon the one making the act possible, has no application. (See, also, Miller v. Citizens Nat. Trust etc. Bk., 1 Cal. App. 2d 470, 477 [36 P. 2d 1008].)”

In some cases, the courts have recognized as applicable the maxim announced in Section 3543 of the Civil Code, which provides:

“Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.”

Johnson, et al. v. Robinson, et al., 203 F. (2) 135 at 136.

The Court, in the case of De Vries v. Sig Ellingson & Co., 100 F. Supp. 781, defines the elements of estoppel at page 787. It says:

“The essential elements of estoppel are. (1) Ignorance of the facts of the party claiming estoppel; (2) misrepresentation or silence concerning the matter where it was a duty to speak amounting to misrepresentation or concealment of a material fact; (3) action by the party relying on the misrepresentation or concealment; and (4) damages resulting if the estoppel is denied. Nelson v. Chicago Mill & Lumber Corp., 8 Cir., 76 F. 2d 17.”

See also Frank v. Claus, 121 C. A. (2) 777 at p. 786, para. (4).

The Court, in this case as in other cases herein cited, points out that in order that the real owner of personal property may be estopped from asserting his title against a person who has dealt with one in possession *in faith* of his apparent ownership, it is the general rule that something more than mere possession and control is necessary. The authorities indicate that possession must be accomplished by indicia of title.

The California Supreme Court, in *Clark v. Hamilton Diamond Co.* above cited, at page 3 (3) used the following language:

“There was no other INDICIA of ownership than mere possession. That was not enough. There must have been some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of the *innocent third persons dealing on the faith of such appearances.* (*Levi v. Booth*, 58 Md. 305 [42 Am. Rep. 332].)” (Emphasis ours).

In other words, the third persons must be “innocent” and they must deal “on the faith” of such appearances. They cannot ignore facts before their eyes which show a cash transaction. They are not “innocent” if they are negligent.

It is the contention of appellant, Motores, that the bank was not an “innocent person” nor did it act prudently or “on the faith” of such appearances as defined in these decisions.

In other words, the bank had notice, and was charged with notice, and was put upon inquiry by the very nature and contents of the unpaid “automobile purchase drafts” which it held and was holding in its collection department at the very time it made the loans upon the automobiles plainly described upon the face of the draft.

Also, Judge Fee, speaking for the Court in the case of *Engstrom v. Wiley*, 191 F. (2) 684 at 688 recognizes that: “Where the rights of *innocent third parties* enter,” the technical ground of defense “is estoppel and not waiver.” (Emphasis ours).

APPENDIX III.

Section 2330 of the California Civil Code reads as follows:

“PRINCIPAL, HOW AFFECTED BY ACTS OF AGENT WITHIN THE SCOPE OF HIS AUTHORITY. An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.” “NOTICE TO AGENT, WHEN NOTICE TO PRINCIPAL, As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.” Section 2332, California Civil Code.

“FOR ACTS DONE UNDER A MERELY OSTENSIBLE AUTHORITY. A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.” Section 2334, California Civil Code.

“PRINCIPAL’S RESPONSIBILITY FOR AGENT’S NEGLIGENCE OR OMISSION. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willfull omission to fulfill the obligations of the principal.” Section 2338, California Civil Code.

These code sections apply to corporations as well as individuals.

Jefferson v. Hewitt, 103 C. 624, 37 Pac. 638.

In the case of Christie v. Sherwood, et al., 113 Cal. 526, the facts were: Plaintiff, a depositor of defendant bank, was asked by one Arnold, the cashier of the bank, if he wanted to lend money to the defendant, Sherwood, to be secured by a first mortgage on Sherwood's property. In accordance with the cashier's request, plaintiff made a loan to Sherwood and took a first mortgage on Sherwood's property as security. *The president and directors of the bank had no actual knowledge of this transaction*, and by reason thereof, the bank made a loan to Sherwood, taking the same property as security. The bank's mortgage was recorded first and plaintiff's mortgage was subsequently recorded. The Court held that plaintiff's mortgage had priority over the bank's mortgage for the reason that Arnold was acting within the scope of his authority, and his knowledge of plaintiff's mortgage was imputed to the bank. The Court said:

"The knowledge of its cashier of the prior mortgage to Christie was the knowledge of the bank"

In First Nat. Bank v. Reed, 198 Cal. 252, the Court said at page 258:

"In the absence of any evidence on the point, it would be assumed that Wickstrom communicated to his principal his knowledge of any facts material to the transaction."

The case of Vanciel v. Kumle, 26 C. (2d) 732, at 734, says:

"The knowledge of Rocca, an agent acting within the scope of his authority, is the knowledge of his principal."

Again, in the case of *Williams v. Hasshagen*, 166 Cal. 386 at 393, a bank case, the Court says:

“His knowledge is presumptively that of the bank, and it makes no difference that he took some personal benefit from the fraud.”

In *Culley v. New York Life Ins. Co.*, 27 C. (2d) 187 at 192, the Court declared:

“A principal is chargeable with and is bound by the knowledge of, or notice to, his agent received while the agent is acting within the scope of his authority and which is with reference to a matter over which his authority extends. (citing cases) The fact that the knowledge acquired by the agent was not actually communicated to the principal, as contended by appellant, does not prevent operation of the rule. The knowledge is, in law, imputed to the principal. The agent may have been guilty of a breach of duty to his principal, yet the knowledge has the same effect as to third persons as though his duty had been faithfully performed. The agent acting within the scope of his authority, is, as to the matters existing therein during the course of the agency, the principal himself. (citing cases) An agent’s knowledge of the content of a contract is imputed to his principal. (citing cases) This rule of law is not a rebuttable presumption. It is not a presumption at all. It is a rule which charges the principal with the knowledge possessed by his agent.”

See also: *Columbia Pictures Corp. v. DeToth*, 87 C. A. 2d 620 at 630-631.

Maron v. Swig, 115 C. A. 2d 87 at 90.

Eagle Indemnity Co. v. Industrial Accident Comm., 92 C. A. (2d) 222 at 228.

APPENDIX IV.

The Obtaining of Property by False and Fraudulent Pretenses.

Section 484 Penal Code of California defines theft as:

“Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.”

It is important to keep the above section of the Penal Code in mind in connection with the language hereinabove quoted in the case of *Nathe v. Fred W. Gray Co.*

Also, a person defrauded of his property by the issuance of a worthless check by the purchaser may recover it.

Engstrom v. Benzel, 191 (2) 689.

In the case of *Kamberg v. Springfield Nat'l Bank*, 103 A. L. R. 306 (see annotations at 310) at page 309, the Court says:

“If an insolvent has obtained money or property by fraud or other tort, that money or property is not properly part of the assets of his estate, and may be reclaimed from the trustee in bankruptcy. Bussing

v. Rice, 2 Cush. 48; Watson v. Silsby, 166 Mass. 57, 43 N. E. 1117; Donaldson v. Farwell, 93 U. S. 631; 23 L. ed. 993; In re New York Commercial Co. (C. C. A.) 228 F. 120; In re Horigan Supply Co. (C. C. A.) 2 F. (2d) 791, Manly v. Ohio Shoe Co. (C. C. A.) 25 F. (2d) 384, 59 A. L. R. 413; California Conserving Co. v. D'Avanzo (C. C. A.) 62 F. (2d) 528; Sternberg v. American Snuff Co. (C. C. A.) 69 F. (2d) 307. Likewise, if the insolvent restores it before bankruptcy occurs, there is no preference, for there is no diminution of assets. Montgomery v. Bucyrus Machine Works, 92 U. S. 257, 23 L. ed. 656; Hough v. Atchison, Topeka & Santa Fe Railway Co. (C. C. A.) 34 F. (2d) 238, 240, 241; Fisher v. Shreve, Crump & Low Co. (D. C.) 7 F. (2d) 149.

But that principle applies only so long as the money or property can be traced and found, either in its original or in an altered form, in some particular assets."

If as stated above such property may be reclaimed from a trustee in bankruptcy, it can likewise be reclaimed from a bank under the facts in this case.

APPENDIX V.

The Conversations and the Agreements Between the Seller and Buyer Are Important and Material, and Admissible in Evidence, in a Case Involving a Third Person Claiming Title to the Property.

1st. The cases which we have heretofore cited in the appendix all point out the importance of knowing what was said and done at the time of the transaction between the seller and buyer for the purpose of arriving at a determination of whether or not the sale was intended to be and was in fact a cash sale. This is a very important issue in this case.

2nd. Such conversations, facts and circumstances are also absolutely essential in order to determine whether or not the automobiles in question were obtained from Motores under false and fraudulent representations of the buyer. This is likewise an essential issue in this case, and the record discloses that the attorney for the trustee recognized it as such.

“Mr. McDonnell: I think that as to the Trustee’s interest, as Mr. Utley is pointing out, I think probably the testimony is relevant and admissible, and that is why I [66] haven’t objected.” (R. 139)

3rd. Without the testimony, which the Court has stricken (R. 70-71) there is absolutely no evidence in the record to support many of the findings which the Court has made favorable to the position of the bank.

In the case of *Wilcox v. Salomone*, 118 C. A. (2) 704 at 711, the Court says:

“Appellants next contend that the court erred in admitting in evidence over their objection certain oral and written declarations made by respondent’s de-

ceased wife relating to the nature of the transaction, and made out of the presence of appellants. These declarations were either testified to by witnesses to whom they were made, or introduced into evidence in their written form. They were of the same nature and all supported the contention that a loan and a mortgage were intended by the appellants in the transaction in question. Thus, they would be 'self-serving declarations,' and hearsay. They would be self-serving since they were in support of the interest of respondent and the deceased declarant. (10 Cal. Jur., Evidence, §311.) They would be hearsay since they rest upon the veracity and competency of some person other than the witness offering them. (10 Cal. Jur., Evidence, §288; Code Civ. Proc., §1845) Declarations of a person deceased or a party to the action, made in the absence of the opposite party sought to be bound by them, which declarations are in support of the party's or declarant's own interest, are not admissible in favor of those who claim rights, which the declaration would maintain. (10 Cal. Jur., Evidence, §§311, 331.) However, there are exceptions to the hearsay rule."

No. 14397.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

MOTORES DE MEXICALI, S. A., a corporation,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSO-
CIATION, *et al.*,

Appellee.

BRIEF OF APPELLEE, BANK OF AMERICA,
N. T. & S. A.

FILED

OCT 15 1954

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BRIEF OF APPELLEE, BANK OF AMERICA, N. T. & S. A.

Statement of the Case.

On March 6, 1953, and April 2, 1953, Appellant sold five automobiles to the Bankrupt, a California corporation [R. 148; Finding 9, R. 63]. Physical possession of the cars was delivered in Mexico to the Bankrupt's representative, together with bills of sale and the Mexican title documents pertaining thereto [R. 148, 132-133; Finding 9, R. 63-64]. The Bankrupt's agent drew non-negotiable drafts on the Bankrupt for the purchase prices of the cars, and delivered the drafts to the Appellant in exchange for possession of the vehicles, the bills of sale, and the title documents [Crs. Ex. A, B, C, D and E; [R. 132-133; Finding 9, R. 64]. The drafts were made payable *through* the Bank, and expressly provided that

they were to be forwarded “for collection only.” The Bankrupt had promised the Appellant three or four months before [R. 140] that the drafts would be paid upon presentment, but the Bank had no knowledge of this promise [Finding 13, R. 66, 140]. The Appellant knew and understood at the time of delivery of the cars and the title documents that the Bankrupt planned to register the vehicles in California and “floor” them with a bank, and Appellant’s manager delivered the title documents for the express purpose of putting the Bankrupt in a position to place a lien on the vehicles and to obtain loans on the security thereof [R. 140, 144; Findings 10, 11, R. 64-65].

The Bankrupt brought the cars to California, obtained California title documents, and borrowed money from Appellee Bank on the strength of trust receipts describing the cars. The California title documents were delivered to the Bank before the advances were made, and the Bank was shown as the “legal owner” thereon [Ex. 4, 5, 6 and 7; Findings 2, 3, 4 and 5; R. 60-62; Finding 11, R. 64-65]. The Bank advanced money in good faith in reliance upon the trust receipts, the California ownership certificates and the possession of the cars by the Bankrupt [Finding 11, R. 64-65].

The drafts, in the form of envelopes, either empty or containing blank pieces of paper, were forwarded by the Appellant through banking channels to the Appellee Bank for collection [R. 65-66]. The March drafts [Ex. A and B] were dishonored by the Bankrupt, returned to Appellant’s Bank and resubmitted by Appellant’s Bank, before the April drafts [Ex. C, D and E] were issued [Finding 12, R. 65-66]. All of the drafts were in the collection department of the Bank unpaid at the time the advances

were made by the Bank to the bankrupt, but the lending officer of the Bank had no knowledge of their existence until after the advances were made [Findings 16 and 17, R. 67-68].

The five disputed vehicles, or their proceeds, came into the hands of the Trustee [Findings 2, 3, 4 and 5, R. 60-62]. On July 29, 1953, the Bank filed its petition to reclaim the vehicles or their proceeds to the extent necessary to satisfy the debt owing from the Bankrupt to the Bank [R. 7-12]. Appellant filed its cross-petition also asserting title to the proceeds and the matter was duly heard and determined in favor of Appellee [R. 70-71]. The Referee's opinion appears at R. 37-52. The order of the Referee was affirmed by order of the District Court on April 29, 1954 [R. 88-89] in which order the District Court adopted the findings and conclusions of the Referee [R. 89]. From this order, Motores de Mexicali appealed. The Trustee did not appeal.

Questions Presented.

1. Whether the Trial Court was correct in concluding that Appellant is estopped to claim the vehicles because it delivered to the Bankrupt possession of the cars and indicia of ownership thereto for the express purpose of permitting the Bankrupt to issue trust receipts placing a lien thereon.

2. Whether the Trial Court was correct in concluding that the presence of the unpaid drafts in the collection department of the Bank at the time the advances were made did not place the Bank upon notice that Appellant claimed a right to the vehicles or their proceeds superior to the lien of the trust receipts issued by the Bankrupt to the Bank.

3. Whether the Trial Court was correct in granting the Bank's motion to strike as irrelevant conversations between the Bankrupt and Appellant which were not heard by or communicated to any representative of the Bank.

Summary of Argument.

1A. The Appellant, by delivering possession of the vehicles and indicia of ownership to the Bankrupt, is estopped to claim any title superior to the lien of the Bank.

B. There are no facts giving rise to an estoppel against the assertion of the Bank's lien.

C. The conversations between the Bankrupt and the Appellant were irrelevant as to the Bank and were properly stricken.

2. The fact that as between themselves the Appellant and the Bankrupt may have intended to make sales of the vehicles for cash does not give the Appellant a right to retain title as against the Bank. The cases cited by the Appellant are distinguishable.

3. The promises allegedly made by the Bankrupt to the Appellant that the drafts would be paid upon presentment and the representation allegedly made by the Bankrupt to the Appellant that the March drafts had been taken care of did not put the Bank on notice of any fraud and in any event such promises and representations did not bind the Bank.

4. The challenged findings are adequately supported by the evidence.

ARGUMENT.

I.

- A. The Appellant, by Delivering Possession of the Vehicles and Indicia of Ownership to the Bankrupt, is Estopped to Claim Any Title Superior to the Lien of the Bank.

It is a long established equitable maxim that "where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." California Civil Code, Section 3543. The California courts have held this maxim applicable to a situation where the owner of property transfers possession to another and gives the other indicia of ownership as was done in this case. *Fowles v. National Bank of California*, 167 Cal. 653, 140 Pac. 271 (1914); *Powers v. Pacific Diesel Engine Co.*, 206 Cal. 334, 274 Pac. 512 (1929); *Peoples Finance etc. Co. v. Bowman*, 58 Cal. App. 2d 729, 137 P. 2d 729 (1943). In the *Bowman* case, *supra*, the court said (p. 736):

After reading the cases, and giving consideration to their *rationale*, we are convinced that, where an owner deposits his property with another and gives the depository such *indicia* of ownership that a reasonable man dealing with such agent is reasonably led to believe the agent is the owner of such property and parts with value in reliance thereon, the third person will be protected even though the true owner is guilty of no more than misplaced confidence. Such misplaced confidence must be held to be negligence within the meaning of the maxim above-referred to. (See also, *Bank of America v. National Funding Corp.*, 45 Cal. App. 2d 320 [114 P. 2d 149].)

In the instant case defendant certainly must be found to have misplaced its confidence in Bowman

and that plaintiff suffered loss thereby. As misplaced confidence amounts to negligence under the facts here, we must hold that the case comes within the language of section 3543 of the Civil Code and that defendant and not plaintiff must suffer the loss caused by the action of Bowman.

It is clear from the testimony that the Appellant delivered the title documents on the vehicles to the Bankrupt for the express purpose, known to the Appellant, of permitting the bankrupt to "floor the cars with the Bank" [R. 144, Finding 10, R. 64]. From the testimony it is also plain that the understanding between the Appellant and the Bankrupt was that the Bankrupt would give trust receipts to the Bank covering the vehicles. The Appellant clearly intended that the Bank was to rely upon the possession by the Bankrupt of the indicia of ownership and the vehicles. The Bank took trust receipts on the vehicles [Exhibits 4 to 7 inclusive] and advanced moneys to the Bankrupt on the basis of the trust receipts and the California ownership certificates obtained by the Bankrupt by the use of the title documents given to the Bankrupt by the appellant. [Findings 2, 3, 4, 5 and 11; R. 60-62, 64-65; 109-116; 132-133].

In the instant case, as in the *Bowman* case, *supra*, the Appellant deposited the property with the Bankrupt and gave the Bankrupt such indicia of ownership that a reasonable person in the Bank's position dealing with the Bankrupt would be led to believe that the Bankrupt was the owner of the property. The language of the court in the *Bowman* case is applicable to this situation and "the third person will be protected even though the true owner is guilty of no more than misplaced confidence." The general manager of the Appellant tacitly admitted that he

placed confidence in the Bankrupt and that the confidence was misplaced [R. 145]. His testimony brings the case squarely within the rule announced in the *Bowman* case, *supra*, and the conclusion is inescapable that the Appellant is estopped from claiming title to the vehicles or their proceeds superior to the lien of the Bank.

Even assuming for purposes of argument that the Seller-Appellant had expressly retained title to the vehicles until the price was paid (which it did not do), it has been held that the seller is estopped as against a third party to claim title. In *Plummer v. Kingsley*, 190 Ore. 378, 226 P. 2d 297 (1951), the court said (226 P. 2d 303):

We limit our decision to the facts of the instant case in which the owner expressly retained title until cash payment should be made but in which he did deliver to the fraudulent purchaser both the car and the certificate of title. We hold that when an owner voluntarily clothes the fraudulent or criminal purchaser with the indicia of title and delivers to him the possession of the chattel, he will be estopped to assert his title as against one who for value and in good faith and without notice purchases the chattel in reliance upon the apparent ownership of the one so entrusted with possession and indicia of title.

To the same effect is *Wren v. Bankers Investment Co.* 207 Okla. 339, 249 P. 2d 712 (1952).

It is to be noted that in the instant case the trial court found that all of the elements of estoppel: representation, reliance, detriment, and lack of notice to the Bank, were present [Finding 10, 11, 14, 15 and 16; R. 64-67]. The Referee also specifically found in Finding 14 [R. 66-67] that the Appellant was negligent in that it failed to retain possession of the Mexican registration papers and the

bills of sale until the drafts were honored and in that it failed to attach to or enclose the aforesaid papers with the drafts but instead delivered the indicia of ownership direct to the Bankrupt, thus placing the Bankrupt in a position to encumber the vehicles.

B. There Are No Facts Giving Rise to an Estoppel Against the Assertion of the Bank's Lien.

Appellant argues in Point 3 of his brief (App. Op. Br. 21-30) that the Bank was somehow under a duty to Appellant to pay the drafts out of the proceeds of the loans and that therefore Section 3543 of the Civil Code does not apply.

In the first place, the drafts which form the basis for the claim of the Appellant [Exhibits A, B, C, D and E] were not drafts drawn upon the Bank but were drafts drawn upon the Bankrupt payable *through* the Wilshire-La Brea Branch of the Bank. The drafts specifically directed the *Bankrupt* to pay to the Appellant the sums specified "upon presentation of this draft to the Bank designated below FOR COLLECTION TOGETHER WITH the documents properly executed indicated on the reserve [*sic.*] hereof." It is to be noted that the drafts in two places in capital letters indicated that they were to be forwarded for collection and collection only, and that the drafts did not contain the words "order" or "bearer" which are prerequisites to negotiability under Section 3082(4) of the California Civil Code.

Counsel seeks to charge the Bank with a duty to pay the drafts, and this contention is grounded upon the simple fact that the drafts were present in the collection department of the Bank at the time the advances were made by the Loan Department of the Bank.

In the first place the function of a bank in handling a collection is strictly that of an agent rendering a service to the forwarding party by presenting the collection item to the obligor, collecting the money if possible, and remitting the proceeds of the collection, when and if received, in accordance with the instructions of the forwarding party. The collecting bank ordinarily has no financial interest in the collection or the proceeds, other than a small collection fee, and it had none in this case. The only concern of the Bank with the drafts here involved was to collect the money, if possible, from the drawee (the Bankrupt) and remit it, if collected, to the Appellant's forwarding Bank.

When the nature of the collection function is understood it becomes clear that the presence of the unpaid drafts in the collection cage of the Bank would not charge the lending department of the Bank with knowledge of their contents. *A fortiori*, their presence in the collection cage gives no notice that the vehicles were unpaid for, or that the Bankrupt's title was defective, or that the Bankrupt had defrauded the Appellant.

In *Hartford v. All Night and Day Bank*, 170 Cal. 538, 540 it was held that it was not the duty of a commercial teller to investigate to determine whether or not a savings account was maintained. The court placed the duty upon the customer to see to it that the Bank was properly advised of the customer's desires. So also in the instant case if Appellant desired the Bank to correlate the lending function with the collection function for its benefit, Appellant should have so directed or requested. This it did not do.

The mere presence in the collection cage of the unpaid drafts does not charge the lending department of the Bank

with knowledge of the contents of the drafts. It would be unreasonable to charge a bank with notice of the ramifications of the myriads of detailed transactions processed each day in the various departments. *State v. Brown County Bank*, 112 Neb. 642, 200 N. W. 866; *Globe Indemnity v. Union Planters' Bank and Trust Company*, 27 F. 2d 496 (C. C. A. 6, 1928). In the instant case the only evidence with respect to the presence of the drafts in the Bank on the dates of the transactions consists in the collection date stamps on the backs of the drafts themselves. The Appellant produced no evidence (and none exists) tending to show that the presence of the drafts was brought to the attention of anyone other than the clerks in the collection cage. It is clear from the testimony and from the findings, on the other hand, that the items were not brought to the attention of the lending officers who handled these loans [Finding 17, R. 68; 116]. Under these circumstances we can see no duty upon the lending officers to divert loan proceeds to the payment of the drafts.

It is fundamental that there can be no actionable negligence in the absence of a duty on the part of the Bank to the appellant. Counsel does not make clear the theory on which he concludes that the Bank was under any duty toward his client to pay the drafts. Even if the Bank had been designated drawee of the drafts there would be no liability imposed upon the Bank to pay them. Civil Code, Sec. 3208. The fact that the drafts were made payable through the Bank was merely a means of designating a convenient place for presentation to Bi-Rite Auto Sales, the drawee.

The appellant argues at considerable length that the presence of the unpaid drafts in the Collection Department

of the Wilshire-La Brea Branch placed the Bank on notice either that the vehicles had been fraudulently obtained by the Bankrupt from the Appellant or that title had been retained by the Appellant until payment of the drafts. In this connection it is to be noted that the drafts [Exhibits A, B, C, D and E] were in the form of envelopes and the writing on the drafts indicated that the reason they were so designed was to provide a convenient means of transmitting the title documents pertaining to the vehicles being sold. It is significant, however, that the Appellant did not use the drafts for this purpose but delivered the title documents to the Bank apart from the drafts, and that two of the draft envelopes [Exhibits A and B] contained blank sheets of paper and three of them [Exhibits C, D and E] were completely empty [R. 133-134]. Appellant therefore chose not to use the drafts for the purpose for which they were designed; yet counsel now insists the Bank should have pretended that they were so used, and is to be charged with negligence for not so pretending.

The forwarding of the drafts through the Bank for collection is entirely consistent with the theory that the vehicles were sold on credit, the credit having been extended by the seller until the drafts shall have been paid. It is significant that the Appellant in many cases granted extensions of time for the payment of drafts [R. 136]. When the draft envelope as a whole is considered together with the fact that it contained either blank pieces of paper or nothing at all, it becomes clear that the existence of the drafts themselves does not compel an inference of either a cash sale or that there was any intent on the part of the parties to retain title to the vehicles until the drafts should be paid, or that any fraud was involved.

The act of the Appellant in delivering the title documents and the fact that the bankrupt had in his possession the California registration certificates were sufficient to rebut any inference of a cash sale or an intent to retain title insofar as the Bank is concerned.

Appellant contends that the presence of the unpaid drafts in the Bank apparently put the Bank on notice of a defect in title to the cars. In this connection it is to be noted that the trial court found in Findings 16 and 17 that the Bank officer in charge of making the advances had no actual knowledge that the drafts given by the Bankrupt to the Appellant were unpaid at the time the advances were made. This finding is supported by the testimony of Mr. Fort [R. 116, 125-126]. The last advance was actually made on May 19, the date of the last trust receipt [R. 120] and the court found that this advance was made prior to the existence of any knowledge of any unpaid drafts on the part of the Bank officers [Findings 16 and 17; R. 67-68]. The fact that the credit was not placed on the ledger of the Bankrupt until May 21 resulted from normal delay in posting and does not mitigate against the fact that the trust receipts and the title documents were delivered to the Bank and the loan commitment made on May 19, 1953.

We do not quarrel with the general propositions set forth in Appendix 3 of the Appellant's Brief to the effect that the actual knowledge of a bank officer is chargeable to the bank and that the knowledge of an agent in general is imputed to the principal. We submit, however, that there has been no showing in this case of any knowledge, actual or constructive, chargeable to the Bank of any intent on the part of the Appellant to retain title to the vehicles.

On the contrary, all of the acts of the Appellant in the transaction were designed to induce the Bank to extend credit on the faith of the title documents and the possession of the vehicles by the Bankrupt.

Counsel contends in Point 3 of his Brief (Br. 21-30 and Appendix 3) that the Bank is chargeable with notice of the Appellant's alleged right as an unpaid seller to reclaim title to the vehicles because the drafts were payable through the Bank, presented at the Bank, and were present in the collection cage at the Bank when the loans were made. This notice, Appellant contends, is chargeable to the Bank under the doctrine of *respondeat superior*. Apparently Appellant contends that the mere presence of the drafts in the branch placed the Bank on notice that the title documents were obtained by the Bankrupt from the Appellant by means of false representations and that the presence of the unpaid drafts placed the Bank on notice of the position of the Appellant as an unpaid seller claiming retention of title.

There are several answers to these contentions. In the first place, as has been demonstrated above, the unpaid drafts themselves disclose no intent on the part of the seller to retain title until the drafts were paid nor do the drafts themselves nor the fact that the title documents did not accompany the drafts indicate any fraud on the part of the Bankrupt. Even assuming for the purposes of argument that the Bank is chargeable with knowledge of the contents of the drafts, the Bank would still be justified in concluding that there was no fraud involved and that the Appellant had intended title to pass unconditionally to the Bankrupt. The trial court so found [Finding 15, R. 67].

The Appellant contends that the presence of the drafts without the title documents together with the fact that the title documents were in the possession of the Bankrupt constituted a set of suspicious circumstances indicating that the title documents might have been stolen by the Bankrupt and that the Bank should have inquired as to how he got title. In answer to this contention we again point out that the Appellant voluntarily relinquished the title documents to the Bankrupt for the specific purpose of enabling the Bankrupt to borrow money on the security thereof. It is a fair conclusion that if inquiry had been made, this fact would have been made known to the Bank.

We do not believe that it is sound to argue that merely because the drafts were designed to be accompanied by title documents it must be concluded that any documents not accompanying the drafts were unlawfully obtained. The parties could and did in this case choose not to place the title documents in the draft envelopes. It is also to be noted that assuming the Bank is chargeable with knowledge of the unpaid drafts, the Bank also had before it knowledge of the fact that some of the drafts had been previously dishonored, returned unpaid to the Appellant's bank in Mexico and resubmitted for collection, all prior to the delivery to the Appellant of the April drafts. All of these facts taken together, it seems to us, would lead a person in the Bank's position to conclude that (a) the Appellant intended to pass title to the vehicles unconditionally to the bankrupt whether or not the drafts were paid, and (b) the Appellant intended the Bank to rely upon the possession of the title documents by the bankrupt.

If the Appellant had desired to protect itself by compelling payment of the drafts before the passage of title to

the bankrupt, the machinery for such protection was readily available: to-wit, the attachment of the title documents to the drafts or the enclosure thereof in the draft envelopes. If the Appellant had chosen this procedure, the transaction would have been a documentary collection and the duty of the Bank would have been clear to retain the title documents for the benefit of the Appellant until the drafts were paid. The Appellant for its own reasons saw fit not to avail itself of this protection, and it seems to us that the Appellant cannot now argue that it was the duty of the Bank to afford it this protection without any instruction, advice or indication that it desired such protection. Everything that the Appellant did, on the contrary, indicated an intention to trust the Bankrupt with title to the vehicles, to enable the Bankrupt to place a lien upon the vehicles and to pay the drafts at the Bankrupt's pleasure. The Appellant seeks by this action to put strings on the title documents at the expense of the Bank now that hindsight indicates that the Appellant's confidence in the Bankrupt was misplaced.

If the Appellant had actually intended the sales to be cash sales, it would have rescinded the transactions or sought to recover possession of the vehicles shortly after March 18, the date the March 6th drafts [Exs. A and B] were returned unpaid for the first time [Finding 12, R. 65]. Instead of doing this, however, the Appellant saw fit to resubmit the drafts for collection a second time and while the first group of drafts was still unpaid Appellant delivered three more automobiles to the bankrupt and took additional drafts as a means of collecting the purchase price. It is submitted that these acts on the part of Appellant are not consistent with the theory now advanced by Counsel that Appellant intended to part with

title only if the drafts were paid immediately upon presentment in the same manner as a check is paid.

There is no basis for Counsel's contention (Br. 30) that the Bank should have informed the Appellant that the Bankrupt was borrowing money on the cars. The Bank did everything that it was supposed to do in these circumstances: it returned the drafts dishonored to the source from whence it received them, the Appellant's Mexican bank. When it is considered that the Appellant's general manager admitted that the flooring of the cars was contemplated by him at the time he delivered them to the Bankrupt, the argument that the Bank should have informed the Appellant of the borrowings seems hardly tenable. [See Finding 10, R. 64.]

C. The Conversations Between the Bankrupt and the Appellant Were Irrelevant as to the Bank, and Were Properly Stricken.

Counsel apparently argues (Br. 28-30) that the testimony consisting of conversations between the Bankrupt and the Appellant outside the presence of any Bank representative were improperly stricken and that if these conversations had not been stricken there would be evidence in the record controverting Finding 15 [R. 67]. Finding 15 is based upon the possession of the vehicles and indicia of ownership in the hands of the Bankrupt and upon the absence in the record of any properly admissible testimony tending to show that any facts indicating the intent of the Appellant and the Bankrupt to make cash sales were brought to the attention of the Bank.

In this connection the Referee and the District Judge correctly concluded that in view of the fact that these

conversations were not heard by any representative of the Bank and their substance was never communicated to the Bank, the conversations were irrelevant and could not in any manner bind the Bank. The conversations were *res inter alios acta*. 2 Jones, Commentaries on Evidence (2d Ed.), Sec. 611, pp. 1131-1134; *Chapman v. Metropolitan Life Ins. Co.*, 172 So. Car. 250, 173 S. E. 801, 807; *Nicholas v. Granite State Fire*, 125 W. Va. 349, 24 S. E. 2d 280, 284; *Carroll v. Rye Township*, 13 N. D. 458, 101 N. W. 894, 897.

II.

The Fact That, as Between Themselves, the Appellant and the Bankrupt May Have Intended to Make Sales of the Vehicles for Cash Does Not Give the Appellant a Right to Retain Title as Against the Bank. The Cases Cited by the Appellant Are Distinguishable.

The Appellant argues in Point 1 of his brief and in Appendix 1 that the drafts, Exhibits A to E, inclusive, must be construed to compel the conclusion that a cash sale transaction was intended.

We do not quarrel with the rules set forth in the cases cited on page 18 of the Appellant's brief and quoted in Appendix 1. We do not believe, however, that these cases are applicable to the fact situation here presented. The *rationale* of the cases cited by the Appellant is that where the parties have intended to make a cash sale, the mere fact that the seller takes the buyer's check in payment does not prevent him from being in the position of an unpaid seller in a cash sale transaction in event the check is dishonored. The reason for this rule is obvious. It is assumed in the normal cash sale that the drawer of

a check on a bank has in the bank sufficient funds to meet the obligation, and the seller of the goods should be entitled to rely upon the issuance of such a check and should not be deprived of his title to the goods simply because he has taken a check as conditional payment.

The rule of the cases cited by the Appellant does not prevent the application of the doctrine of estoppel where the elements of estoppel are present. Indeed in *Clark v. Hamilton Diamond Company*, 209 Cal. 1, cited App. Op. Br. Appendix 1, p. 11, the Supreme Court took great care to point out that no indicia of ownership to the diamond ring was delivered by the plaintiff to the purchaser. The Court said (p. 3):

As between the original seller and third parties, the relation is to be determined by what the vendor has done or has not done. In this case the plaintiff gave to Justice, the original purchaser, no indicia of title other than the possession of the property.
* * * There was no other indicia of ownership other than mere possession. That was not enough. There must be some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell and which the real owner will not be heard to deny or question to the prejudice of third persons dealing on the faith of such appearances.

In the instant case the Bank is in the position of a third party which has relied upon the acts and conduct of a seller who clothed the Bankrupt with apparent ownership and authority to encumber the property. Indeed the Appellant gave the Bankrupt actual authority to encumber the property [Finding 10, R. 64].

Several courts have applied the doctrine of estoppel in cases where a check has been given in payment of the purchase price and later dishonored upon presentment. *Sullivan Co. v. Wells*, 89 F. Supp. 317 (D. Neb. 1950); *J. L. McClure Motor Co. v. McClain*, 34 Ala. App. 614, 42 So. 2d 266 (1949); *Seward v. Evrard*, 240 Mo. App. 893, 222 S. W. 2d 509 (1949); *Kent v. Wright*, 198 Okla. 103, 175 P. 2d 802 (1946).

It is further to be noted that all of the cases cited by Counsel involve the giving of a negotiable check or draft for the price, and that the Uniform Sales Act in codifying this rule specifies that it is applicable "when a bill of exchange or other negotiable instrument has been received as conditional payment" (Civil Code, Sec. 1772(b)). The drafts involved in the instant case were clearly non-negotiable because they were not made payable to order or to bearer as required by Section 3082(4) of the Civil Code and because the drafts clearly specified that they were to be forwarded for collection only. This indicates a clear intent on the part of the drawer of the drafts that they were not to be negotiated for immediate credit. The doctrine of the cases cited by the Appellant in Appendix 1 is based at least in part upon a public policy in favor of inducing sellers to accept negotiable instruments as conditional payment. There is no apparent necessity for extending this doctrine to cover non-negotiable drafts.

In any event, the cases relied upon by Appellant are readily distinguishable:

In *De Vries v. Sig Ellingson & Co.*, 100 F. Supp. 781 (D. Minn. 1951) (App. Op. Br. Appendix 1, pp. 1-2), the court held that mere possession of the goods was not enough to create an estoppel. In that case a worthless

check was given as conditional payment for goods. No indicia of title passed from the seller to the buyer.

In *Engstrum v. Benzel*, 191 F. 2d 689 (9 Cir., 1951), and *Engstrum v. Wylie*, 191 F. 2d 684 (9 Cir., 1951) (App. Op. Br. Appendix 1, pp. 2-3), this Court recognized that a check may be taken as conditional payment in a cash sale transaction and that if the check is dishonored the seller may retake the goods. In the *Wiley* case, *supra*, at 191 F. 2d 688, this Court expressly recognized the applicability of the doctrine of estoppel in cash sale transactions where the rights of third parties are involved.

In *Johnson v. Robinson*, 203 F. 2d 135 (App. Op. Br. Appendix 1, p. 4), the court held that a cash sale was intended and that the taking of the check did not amount to an extension of credit. No indicia of ownership passed and the court held that the seller may reclaim the property from one who "does not have any better equitable claim to it than the vendee." It is the position of the Bank in the instant case that it has a better equitable claim to the vehicles and their proceeds than either the Bankrupt or the Appellant.

Towey v. Esser, 133 Cal. App. 669 (App. Op. Br. Appendix 1, pp. 6-9), was a controversy between an attaching creditor and an unpaid seller. The court held that the attaching creditor of the buyer had no better right to the proceeds of the cattle than the buyer had. While it is true in that case that a bill of sale for the cattle was given, the attaching creditor was not a bona fide purchaser who relied upon the bill of sale. In the instant case the Bank was a bona fide encumbrancer which relied upon the product of the Mexican registrations and

bills of sale which were used by the bankrupt to obtain California ownership certificates on the vehicles involved [Finding 11, R. 64-65].

South San Francisco Packing and Provision Company v. Jacobsen, 183 Cal. 131 (App. Op. Br. Appendix 1, pp. 4-6), also was a controversy between an attaching creditor of the buyer and the unpaid seller. In that case a worthless check was given in payment for hogs and the seller gave no indicia of ownership. There was thus no question of estoppel raised.

Peerless Motor Co. v. Sterling Finance Corp., 109 Cal. 621 (App. Op. Br. Appendix 1, pp. 9-10), was a worthless check case involving the sale of an automobile. In that case neither possession of the vehicle nor any indicia of title was delivered by the seller to the buyer. The court expressly found that there was nothing in the conduct of the seller which estopped it from asserting title to the vehicle, thus tacitly recognizing that in a proper case the doctrine of estoppel would be applied.

In summary we submit that none of the cases cited by the Appellant impair the applicability of the doctrine of estoppel in the instant case. The cases cited in Section 1 of Appellant's Opening Brief and in Section I A of this Brief adequately demonstrate that where a seller of goods conducts himself as the Appellant here has done, he is estopped to contend as against third parties that title was retained, even though he may have intended to retain title.

III.

The Promises Allegedly Made by the Bankrupt to the Appellant That the Drafts Would Be Paid Upon Presentment and the Representation Allegedly Made by the Bankrupt to the Appellant That the March Drafts Had Been Taken Care of Did Not Put the Bank Upon Notice of Any Fraud, and in Any Event Such Promises and Representations Did Not Bind the Bank.

Appellant argues in Point 2 of his brief, pp. 19-20, and in Appendix 2, pp. 14-16, that a representation allegedly made by the bankrupt to the Appellant on or about April 2, 1953, to the effect that the March drafts had been taken care of constituted fraud and that the April vehicles were therefore stolen by the bankrupt from the Appellant. Counsel concludes from this representation (which was, of course, stricken as irrelevant on the Bank's motion) that the Bank should have inquired as to the manner in which the Bankrupt obtained the California ownership certificates. In the first place the issue dates on the California ownership certificates presented to the Bank [Exhibits 4, 5, 6 and 7] show that in each instance they were issued at a date subsequent to the date of the applicable draft. If investigation had been made by the Bank, the Bank would have been justified in concluding from this fact alone that it was never intended that the title documents be included with the drafts or held until the drafts were paid.

Carrying Counsel's theory (Br. p. 20) to its logical conclusion would require that the Bank not rely in any instance upon the possession by anyone of the official ownership certificate issued pursuant to Division 3, Chapters 1, 2 and 3 of the Vehicle Code of California. The

Appellant would have this Court impose upon the Bank in each instance a duty to inquire behind the ownership certificate and require the presentation of evidence that the party in possession of the ownership certificate had fully paid for the vehicle.

We submit the Appellant's Point 2 is entirely without merit for the further reason, previously discussed that the drafts themselves [Exhibits A to E inclusive] contain no indication of any intent on the part of the seller to retain title to the vehicles until the drafts had been paid.

The Appellant cites and relies upon *Nathe v. Fred W. Gray Co.*, 75 Cal. App. 2d 682 (1946). In that case the court held that the encumbrancer was not a bona fide encumbrancer because it had accepted a forgery of the true owner's name upon the encumbrance documents and because the bill of sale had been stolen from the room of the true owner. The court pointed out in the *Nathe* case that the true owner had done nothing to give rise to an estoppel. The case is clearly distinguishable from the instant case by reason of the fact that here the Appellant voluntarily delivered the indicia of ownership and possession of the vehicles to the bankrupt and authorized the bankrupt to encumber the vehicles [Findings 10, 11, R. 64-65].

Counsel contends in Point 4 of his brief [R. 31-32] that the Court should have permitted the witness Resnick to answer the question as to whether or not he told the Appellant that the March drafts had been taken care of. It is submitted that the Referee's ruling in excluding this testimony as to the Bank was correct under the authorities cited in Section I, C of this brief. In any event the same matter was covered by the testimony of Mr. Luken.

Since the testimony of Mr. Luken on this point is uncontroverted we cannot see how the Appellant was prejudiced by the rejection of the testimony of Mr. Resnick. Mr. Luken testified [R. 147] that "I asked him how he was with the drafts. He said that everything has been taken care of." The testimony of Mr. Resnick, the exclusion of which the Appellant now contends was error, was therefore cumulative, whether or not it was material or relevant.

IV.

The Challenged Findings Are Adequately Supported by the Evidence.

The Appellant argues (Br. 33-38) that there is no evidence to support Findings 10, 11, 14, 15 and 17. Counsel construes the motion to strike as including all of the testimony of Mr. Resnick beginning at R. 127, all of the testimony of Mr. Luken beginning at R. 137, and all of the testimony of Mr. Rodriguez beginning at R. 147. It is clear from Conclusion of Law No. 6 [R. 70] and from the Referee's order [R. 171] that the only matters stricken were the conversations between the representative of the bankrupt and the representative of the appellant. The remainder of the testimony of these witnesses remains in the record.

Finding 10 [R. 64] is supported by the testimony appearing at R. 144. Finding 11 is supported by the testimony appearing at R. 132-133, 144 and R. 111-116. Finding 14 is supported by R. 133-134, 144. Finding 15 is supported by the Exhibits A to E inclusive and 4 to 7 and Finding 7 is supported by testimony at R. 141, 144, 132-133, 145, 135; Exs. A to E, inclusive, and R. 116. None of the testimony referred to and relied upon in

support of these findings was stricken testimony since the order granting the motion to strike was confined to the conversations.

Conclusion.

The significant point in this case was the delivery of possession of the cars and the title documents by the Appellant to the Bankrupt with the intent that the Bankrupt should "floor" the vehicles with the Bank, thus placing a first lien in favor of the Bank upon them. This delivery of title documents, whether characterized as intentional or negligent, enabled the Bankrupt to obtain California ownership certificates showing the Bankrupt as owner of the vehicles and enabled him to borrow money on the strength of the vehicles from the Bank. In lending, the Bank relied upon the Bankrupt's possession of the California ownership certificates. The presence of the unpaid drafts in the collection department of the Bank was not a sufficient circumstance to charge the Bank with notice of any defect in the bankrupt's title to the vehicles. The case is therefore controlled by the authorities cited in Section I of this brief, interpreting and applying Section 3543 of the California Civil Code to a case of this type, and placing the responsibility upon the Appellant. The decisions of the Referee and of the District Judge were clearly correct and the order appealed from should be affirmed.

Respectfully submitted,

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No. 14397

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOTORES DE MEXICALI, S. A., a corporation,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, *Appellee*, and E. A. LYNCH, Trustee of the Estate of Arbel, Inc., doing husiness as Bi-Rite Auto Sales, Bankrupt.

REPLY BRIEF OF APPELLANT.

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PAUL P. O'BRIEN,
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REPLY BRIEF OF APPELLANT.

Preliminary Statement.

At the outset, we wish to draw the attention of this Honorable Court to what appears to us to be a rather inconsistent position taken by appellee.

In one breath the appellee contends that the order of the Referee granting its motion to strike the evidence of conversations between Motores and the bankrupt was proper, and in the next breath tries to strengthen appellee's position by reference to said evidence, or to findings which could only have been based upon the stricken evidence.

We will also point out other instances where appellee apparently accepts as facts parts of sentences of the stricken conversations without adopting the whole of such sentences.

Let's Keep the Record Straight.

Before we begin answering the points of argument made by the appellee, beginning at page 5 of its brief, and so that there may be no confusion over what testimony was objected to and stricken by the order of the Court, we will quote in full, First, beginning with the examination of Resnick [see R. 128, where first objections made; R. 130-132]:

“Q. Now, do you recall along about April 2nd when you came down to Mexicali to purchase a number of cars from Mr. Luken of the Mexicali Motors?
A. Well, I don't recall the exact date. I know I went down to Mexicali.

Q. At the time you were there do you recall his having asked you if all the drafts for the month of March had been taken care of? A. Yes.

Q. And you recall telling him that they had been?
Mr. Fabian: I object to that on the ground it is immaterial to any of the issues before this Court as to the [56] title to the vehicles.

The Referee: What is the purpose of it?

Mr. Utley: It shows the representations that were made at the time of obtaining possession of the cars and title to them.

The Referee: You mean representations made to your client?

Mr. Utley: Yes.

The Referee: By the bankrupt?

Mr. Utley: Yes.

Mr. Fabian: But they are not binding on the bank. They are immaterial as far as the bank is concerned.

The Referee: Wouldn't that be so unless the bank knew about it?

Mr. Utley: May it please the Court, I will cover that point later on about the bank.

Mr. McDonnell: I think the Court should also bear in mind this is a three-cornered lawsuit between the Trustee and the bank and Mr. Utley's client.

Mr. Utley: Of course, the bank doesn't stand in the position of an innocent purchaser.

The Referee: That is questionable in California. Go ahead. I think the objection is good unless you can show—unless you can tie it up with the bank some way.

Mr. Utley: May it please the Court, I will call your attention in a few minutes as to how and in what manner THE [57] is not in the position of an innocent purchaser.

The Referee: I know, but I mean any conversations like that unless the bank was connected with it wouldn't bind the bank, would it?

Mr. Fabian: That is my point.

Mr. Utley: This particular conversation won't bind the bank. In other words, we don't contend that the bank was a party to the transaction in question, to the transaction of getting the cars away from my client without paying for them—at that particular moment, anyway.

The Referee: I think you had better drop that line unless you can connect it with the bank in some way.

Mr. Utley: Well, I believe that is all then with this witness."

Second: From the examination of Luken [R. 137-139]:

"Q. Now, after they started with Bi Rite did you have a conversation with Mr. Resnick with respect to selling them cars? A. Yes, sir.

Mr. Fabian: I object to the conversation as not binding on the bank and hearsay.

The Referee: Wouldn't that be true?

Mr. Utley: May it please the Court, here is the situation. We have a right to show fraud here be-

cause otherwise if we sell automobiles under false representations we don't part with them voluntarily, and if the bank has knowledge of some situation that would estop them, that is a question as far as the bank is concerned.

Now, furthermore, there is another question here. If there is any equity in these cars over and above the amount of the bank's interest in them, and these titles to these cars were obtained from Mr. Luken under false pretenses, he would be entitled to that equity without regard to the bank's position.

The Referee: I know, but wouldn't the bank have to [65] be involved some way?

Mr. Fabian: Yes.

Mr. Utley: It is our contention, please the Court, that these drafts—if you will examine them, those drafts are all automobile purchase drafts, and they show on their face that they were for the purchase of a certain automobile, and they show on their face they were to be paid on presentation to the bank. Now, it is our contention that those drafts *laying there in the bank unpaid*, whether Mr. Fort himself knew about it or not, the bank was charged with knowledge that those drafts on these particular cars described in the drafts had not been paid and they were advancing money on cars that they knew had not been paid for.

The Referee: Assuming all that to be true, how would any conversation of this witness with someone else with which the bank was not concerned bind the bank?

Mr. Utley: Well, in the first place we must show that there was a fraudulent representation made to Mr. Luken in order to—

The Referee: Well, this is the way we will handle it. I will permit the question to be answered but

you may move to strike it unless they connect it up with the bank.

Mr. Fabian: All right.

Mr. McDonnell: I think that as to the Trustee's interest, as Mr. Utley is pointing out, I think probably the testimony is relevant and admissible, and that is why I [66] haven't objected.

The Referee: That is right."

Third: After the examination of Rodriguez had been concluded [R. 152] the following motion:

"Mr. Fabian: I think so. I move to strike, your Honor, the testimony of Mr. Rodriguez and Mr. Luken and—

The Referee: Let's handle that this way, take that under submission and and cover that on briefs, too. How will that be? I think that is a good motion.

Mr. Utley: I don't think it is. It is not good against the Trustee in any event because he stands in the position of the bankrupt. I think it is tied in with the bank on the idea you might say a bum check was presented to them for the sales price of that car and it was lying in the bank at the time and they certainly were put on notice.

The Referee: Well, that is the question, whether there was sufficient notice. You cover that in your briefs."

At the conclusion of the Referee's memorandum [R. 52] we find this language:

"The motion to strike out *the testimony of the representatives of the bankrupt and the Mexican corporation*, to which the Bank was not a party, must be granted." (Emphasis ours.) [See also, R. 50-51, par. 5.]

Notwithstanding the above ruling, it is interesting to note that the Referee in his memorandum [R. 44] says:

“The evidence indicates that the Mexican corporation and the bankrupt contemplated a sale for cash. It is true that no checks were given, but the drafts given were intended to be of a similar nature. The bankrupt represented and the Mexican corporation understood that the drafts would be paid upon their presentation to the Bank.”

How, may we ask, could the Referee arrive at the above conclusion and also make the findings hereinafter referred to without the benefit of the stricken evidence?

Paragraph 6 [R. 70] of the Referee's conclusions of law is:

“The motion of the Bank to strike the testimony relating to the conversations between the representative of Motores de Mexicali, S. A. and the representative of the bankrupt was proper and must be granted, so far as the Bank is concerned.”

and the Referee's order [R. 71] paragraph 5:

“That the motion of the Bank of America National Trust and Savings Association to strike the testimony pertaining to the conversations between the representative of the bankrupt and the representative of Motores de Mexicali, S. A. is granted.”

Now, one of the points emphasized by the Bank is the fact that Motores parted with the muniments of title to the cars. And where do we find this evidence except from the conversations between the bankrupt and Motores? The drafts, the documentary evidence, which the bank saw, say in effect that the muniments of title are attached. Appellee, in its brief at page 2, says:

“The Appellant knew and understood at the time of delivery of the cars and the title documents that

the Bankrupt planned to register the vehicles in California and 'floor' them with a bank, and Appellant's manager delivered the title documents for the express purpose of putting the bankrupt in a position to place a lien on the vehicles and to obtain loans on the security thereof [R. 140, 144; Findings 10, 11, R. 64-65]."

and pages 140-144 of the record are cited in support of the above statement. We wish to quote from pages 139-144 of the record to demonstrate beyond doubt that the testimony given on these pages of the record related to a conversation between the bankrupt and Motores, and is entirely different from that represented by appellee:

"Q. And where did this *conversation* take place?

A. In my office in Mexicali.

Q. And do you recall about when? A. I can't recall.

Q. Was it late last year or early this year? A. Well, it was more late last year.

Q. And what was said—what did Mr. Resnick tell you? A. *He told me* that he wasn't in business any more with Mr. Abel Melendez, who was the man that was paying for the cars with checks in Mexicali, but now he was in a patnrnership with Mr. Cowan and they had all kinds of money and Mr. Cowan had put up a guarantee with the bank, that they were going to buy the cars with those drafts and the [67] drafts would be paid immediately on getting to the bank.

Q. What, if anything, *did he say* to you with respect to your delivering him immediate title to the cars? A. *He told us* they needed the titles in order to bring the cars across the border, bring them into California, and then take those papers into the Highway Patrol or the Registration Department here and get the pink slip, and with the pink slip they can floor

the cars with the bank and pay the drafts immediately upon presentation to the bank.

Q. And did you believe the representations he made to you with respect to their financial ability to pay upon presentation? A. Well, I believed him. We had done business with him before.

Q. And did you—after his telling you that, did you give him the title to the cars as well as— A. Yes, sir.

Q. If you had known that the drafts would not be paid immediately upon presentation, would you have parted with title to the cars? A. No, sir, because that is one thing I explained to him very clearly. We wouldn't give the titles unless we got the money." [R. 139-140-141.] (Emphasis ours.)

Cross-examination.

"Q. Now, in this *discussion* you testified about [71] Mr. Luken, you testified that *Mr. Resnick advised you* that—and you understood that the purpose of delivering the title documents in Mexico was that the cars would be floored; isn't that correct? A. Yes.

Q. And you understood what flooring means and understood at that time what flooring means; is that correct? A. Yes, sir.

Q. And that was contemplated at the time you delivered him the documents? A. Correct.

Q. Now, did you put the blank pieces of paper in those envelopes, Mr. Luken? A. No, sir, that is the way I was getting all the drafts (indicating). I didn't know there was a piece of white paper inside, or whatever there was inside.

Q. In other words, that is just the way they came to you? A. Yes, sir.

Q. Did you know there was blank pieces of paper inside of some of them? A. I knew after I opened

one when I got this back. I thought maybe it was a list of the cars that Mr. Rodriguez had specifying title or something that Mr. Resnick had, but I didn't know it was a white paper.

Q. Did you put these X's on the reverse of the drafts? [72] A. No, sir.

Q. At the place where it says 'Documents enclosed'? A. No.

Q. Do you know who did? A. Well, I think Mr. Rodriguez." [R. 144-145.] (Emphasis ours.)

We submit that appellee is in no position to take advantage of evidence which it has caused to be stricken, either in support of its argument or in support of findings which its counsel prepared pursuant to the Referee's direction. [See last paragraph Referee's Memo., R. 52.]

We could go on and on and cite numerous instances of where the appellee attempts to strengthen its position by virtue of facts only disclosed by the stricken evidence, but we believe the above will suffice to demonstrate our point here.

May we also suggest that if the Bank is not bound by the conversations between the bankrupt and Motores neither is it bound by their acts and conduct and whatever rule applies to the admissibility of one applies to the other.

Comment Upon Factual Statements Made by Appellee.

We take exception to the statement made at page 3 of appellee's brief to the effect that the lending officer of the bank had no knowledge of the unpaid drafts until after the advances were made, for as we shall hereinafter point out, we have Mr. Fort's (the lending officer) admission to the contrary. [R.—cross-examination—119-120.]

Not only have we shown that counsel for appellee has resorted to some of the evidence which appellee caused to be stricken in making his "Statement of the Case" on the first three pages of the brief, but a reading of the above quoted and undisputed testimony of Mr. Luken [R. 140] shows that the expressed purpose of flooring the cars with the Bank was to meet the payments of the drafts immediately upon presentation to the bank. [R. 140.]

It is also noticeable that counsel for appellee fails to comment upon the testimony of Mr. Fort, assistant cashier of the branch bank who actually made the loan to the bankrupt, that he knew on May 19, 1953 [R. 120] "the day the *last drafts to my knowledge were returned*" (emphasis ours) that a number of drafts then in the bank had not been paid. Yet on this very day he loaned the bankrupt \$4,925.00 on the two Chevrolets described in two of the drafts of April 2, 1953, which were then in his bank and were returned unpaid on May 19, 1953. We quote from the record [R. 114-115]:

"Q. Mr. Fort, I show you Trust Receipt No. 7884 [37] dated May 19, 1953, and ask you when you first received that document? A. That would have been on or about that date, May 19th.

Q. 1953? A. Yes.

Q. Did you give a credit when you took that trust receipt in? A. We did, in the amount of \$4,925.

Q. Does that show on the ledger sheet that is in front of you? A. \$4,925 was credited to the account on *May 21, 1953*.

Q. Did you receive any other document when you received that trust receipt? A. Yes. We received four California Ownership Certificates.

Q. Are these documents two of the California Ownership Certificates that you received at that time? A. They are.

Q. And by 'these documents,' I refer to California Vehicle Certificates numbered T-1308392 and T-1308394. Those are the ones you received with this trust receipt? A. That is correct.

Mr. Fabian: I offer this—

Mr. Utley: Let me ask you, counsel, which of your [38] cars are covered in that one?

Mr. Fabian: Those are the two Chevrolets, Mr. Utley.

Mr. Utley: Those will be Exhibit 6?

The Referee: That is right, Bank of America's Exhibit 6." (Emphasis ours.)

and upon cross-examination [R. 119-120] Mr. Fort testified:

"Q. (By Mr. Utley): Mr. Fort, you testified a moment ago of your own personal knowledge that you didn't know there were any unpaid drafts, I believe you said, didn't you? A. Yes.

Q. You knew, did you not, that the bankrupt or Bi Rite Auto Sales had been purchasing cars from Motores de Mexicali in Mexico? A. As of what date or what time?

Q. Well, first, you knew of that, didn't you?

The Referee: You ought to give him a date.

The Witness: I did sometime in May. I don't recall the exact date.

Q. (By Mr. Utley): Well, while the drafts were still in the bank? A. The day that the last drafts to my knowledge were returned. That is the first knowledge I had.

Q. That appears to have been on May 19, 1953, that the last drafts were returned. Then you knew of that transaction at that time? A. Yes.

Q. And you knew that there were a number of drafts then in the bank that had not been paid? A. I did on that date, yes.

Q. Now, isn't it a fact that subsequent to that [44] date you extended a credit to BiRite on your ledger sheet here of—a credit on some of the cars purchased from Motores de Mexicali? A. On what date?

Q. You gave a date a while ago, I think it was the 21st.

The Referee: Wasn't it the 19th?

Mr. Utley: I think the date of the trust receipt shows on the Chevrolet the 19th. That was the date the drafts were returned, and the credit I think shows on the 21st of May.

The Witness: Well, of course, that day, on the 19th if we took them on the 19th, it is very possible that they would not have been credited until the 21st. However, I don't recall that 21st date."

That certainly shows actual knowledge of the bank officer who made the loan to the bankrupt of the existence in his bank of the unpaid drafts—drafts which he knew were being returned by his bank unpaid—covering, among others, two Chevrolet automobiles on which he on that very day loaned the bankrupt \$4,925, and this credit was not given the bankrupt until two days later. This presents a clear case of actual knowledge of unpaid drafts by the lending officer of the bank before the money loaned got beyond the bank's control. And this transaction covers one-half of the money involved in this contract.

As heretofore pointed out in our opening brief, these two Chevrolets were obtained by the bankrupt from Motores on April 2, 1953, on the strength of Resnick's statement on that day made to Luken to the effect that all previous drafts had been paid. [R. 130-131; Re-direct examination, R. 146-147.]

ARGUMENT.

Answer to Point I of Appellee's Brief.

We are in agreement with the principle of law announced in Section 3543, Civil Code of California, and with the law in *Peoples Finance, etc. Co. v. Bowman*, 58 Cal. App. 2d 729, and other cases of similar import.

But, it is clear that the facts here are entirely different. Here appellee had possession and knowledge of the unpaid drafts. It could not look at the drafts without knowing that they were automobile purchase drafts covering the same automobiles upon which it was loaning money. The drafts also plainly stated that the muniments of title, indicated on the reverse side of the draft, would accompany the draft and when so presented, properly executed, Motores was to be paid the amount of money designated in the draft. This clearly disclosed a cash transaction, and appellee knew that it was the intent of the bankrupt to pay the draft promptly upon presentation provided proper documents conveying good title were available. When the bankrupt came to the bank to floor the automobiles in question with California pink certificates already in its name, this disclosed a variance from the procedure contemplated by the wording of the drafts, over the bankrupt's own signature, yet, as far as the evidence shows, the bank did not as much as question the procedure.

The appellee was charged with knowledge that similar drafts theretofore presented through appellee for payment had been paid promptly. [R. 128-142.] These drafts were numerous as the purchase of automobiles by the bankrupt from Motores ran as high as forty or fifty cars a month—all paid by automobile purchase drafts through appellee bank. It was a course of regular busi-

ness transactions handled through appellee bank. This, therefore, was not a single or remote transaction, and according to the undisputed evidence of the bankrupt and Motores, who gave the only testimony upon the subject, the prompt payment of these drafts through appellee bank was a common and regular practice over a period of several months. The fact that the bankrupt failed to pay the drafts promptly upon presentation in March and April, 1953, presented an unusual and out of the ordinary procedure from the previous transactions, where prompt payment had always been made. All of this, we respectfully urge, presented a danger signal and warning to appellee bank that there was something wrong. Banks are most always very alert and do not overlook such conduct on the part of people with whom they are doing business. Would such danger signals lead a reasonable man or a prudent banker to stop and inquire, especially in the light of the language upon the face of the draft? Would the prudent banker loan money upon automobiles which he knew had not been paid for?

In the previous transactions where the drafts were paid promptly upon presentation and the bankrupt borrowed money upon the automobiles described in the paid drafts, there was no reason for alarm since the purchase price had been paid and title had passed under the law. But where the purchase price has not been paid and that fact is known to the bank by the language upon the face of the draft itself, which is in the possession and under the control of the bank, and where the draft clearly states that payment of the draft and delivery of proper title to the automobile were concurrent conditions to be performed, such circumstances, we respectfully submit, put a reasonable person upon inquiry and upon notice.

As pointed out in our opening brief, these muniments of title held by the bankrupt, contrary to the language and intent expressed in the draft, could very well have been stolen, and were in fact stolen property under the provisions of Section 484, Penal Code of California, since the obtaining of property under false pretenses is defined as theft. The appellee is chargeable with knowledge that such is the law.

Is the appellee bank, under the facts here, an innocent third party; a holder in good faith and without notice? We think not, and therein is the distinction between the facts in this case and the facts in the cases cited by appellee.

The bank in the case of *Fowles v. Nat'l Bank of California*, 167 Cal. 653, had no danger signals such as were glaring before the eyes of appellee here at the very moment it loaned the money. The same is true of appellant's position in *Powers v. Pacific Diesel Engine Co.*, 206 Cal. 334.

In the case at bar the drafts in the possession of the appellee plainly disclosed, over the signature of the bankrupt, that titles to the automobiles were intended to be delivered at the same time the drafts were paid, and not before. The appellee bank had no knowledge of anything to the contrary. If it did, its officer failed to reveal it while testifying.

Just how the quoted language in the *Bowman* case on page 5 of appellee's brief supports the bank's position, in the light of the facts here presented, we do not know. We have pointed out facts which disclose that the bank did not act with the caution a reasonable prudent person would act under the circumstances.

If the bankrupt had borrowed the money from some bank or finance company, who were not handling the collection of the automobile purchase drafts upon the strength of its indicia of ownership, and who was without the information and knowledge possessed by the appellee bank, and who otherwise acted in good faith and without notice of any defects in the title, the principle of law announced in the cases cited by appellee would be more in point.

In passing it is well to observe that the evidence in the cases cited by appellee, of a similar character to the evidence stricken upon appellee's motion herein, somehow was permitted to stand and was considered as competent evidence in those cases. The same is true with respect to similar evidence in the cases cited on page 18 of our opening brief.

We again find appellee making use of and citing evidence on page 6 of its brief which it caused to be stricken. There was no evidence concerning the right of the bankrupt to floor the cars except that coming from the conversation between the bankrupt and Motores and even so, counsel overlooks the full purport of this conversation which is to the effect that the flooring arrangement was to be used, whenever it was used, for the purpose of paying the purchase drafts promptly upon presentation to the bank. So far as the evidence shows, the appellee bank had no knowledge of this conversation. The appellant had a right to assume that the bank, by the very wording of the drafts, would know and understand that appellant was an unpaid seller for cash.

It is noticeable that the Oregon case cited on page 7 of appellee's brief holds that the owner

“will be estopped to assert his title as against one who for value *and in good faith and without notice*

purchases the chattel in reliance upon the apparent ownership of the one so intrusted with possession and indicia of title.” (Emphasis ours.)

It, as we have heretofore pointed out, is our contention that the appellee bank did not act in good faith and without notice.

Counsel for appellee would have the Court believe that the only reason the titles to the automobiles were delivered to the bankrupt was to enable him to borrow money on them at his will. This is not the testimony. [R. 140.] The bankrupt told Luken: 1st. He needed the titles in order to bring the cars across the (International) border; 2nd. Bring them in to California; 3rd. Then take those papers into the Highway Patrol or the Registration Department and get the pink slip; 4th. And with the pink slip they can floor the cars with the bank and pay the drafts immediately upon presentation to the bank.

The evidence is not clear, but it is doubtful if it was contemplated by the bankrupt and Motores that the drafts given, for example, on April 2, 1953, were to be paid by the flooring of the automobiles described in said drafts. It is obvious that the purchase drafts would, in the ordinary course of business, arrive at appellee bank in Los Angeles much sooner than the Mexican titles could be processed through the Motor Vehicle Department and the pink slips obtained.

If, therefore, the drafts were paid promptly upon presentation to the bank, the same as a check, as promised, the drafts would be paid long before the pink slips could be obtained from the Motor Vehicle Department.

This is further borne out by the fact that the pink slips on the two Chevrolets heretofore mentioned were not presented to the bank for the flooring of these two cars

until May 19, 1953. The drafts for these two cars were issued on April 2, 1953, and the documents of title were delivered to the bankrupt on the same day.

The loan on the Buick purchased on April 2, 1953, was not applied for until May 9, 1953. The loans on the two cars purchased on March 6, 1953, were not made until a month later. This, no doubt, was due to the fact that it took that long to secure the pink slips from the Motor Vehicle Department, whereas the drafts were presented for payment long before these dates, and if paid promptly as agreed, the money would have been available for appellant before the bankrupt would have been in a position to floor the cars with the bank.

This, of course, would not prevent the bankrupt from flooring cars previously paid for to secure money to pay subsequent drafts.

The expedition of securing California pink slips was only one of the several reasons for delivering the documents of title to the bankrupt. The bankrupt was confronted with the problem of bringing these cars through the customs at the International Border and into California with Mexican license plates and it appeared that some evidence of title was needed for this purpose.

We confess that we might have made this evidence clearer by additional questioning had we observed same at the time, however, we believe that the inference we have drawn from this evidence is reasonable.

We did not intend to convey the impression, as counsel for appellee states on page 8 of its brief, that appellee was under a duty to appellant to pay the drafts out of the proceeds of the loans. The thought we did intend to convey was that appellee was negligent under Section 3543 of the Civil Code of California in loaning

money on these automobiles when it knew by the plain language of the drafts in question that the automobiles were not paid for. In other words, if the language on the face of the drafts indicated anything, it was that the sales were intended as cash sales for according to the terms of the drafts, muniments of titles were to be delivered to the purchaser only upon payment of the drafts.

Appellee tries to make much of the words “for collection” upon the face of the drafts notwithstanding evidence amply supporting the Court’s finding that as between the parties the sales were intended as sales for cash.

Appellee also overlooks the fact that the drafts state clearly that the drafts are to be paid to Motores when the documents of title referred to on the reverse side of the draft are with the draft, properly executed. This shows that the delivery of title and the payment of the drafts were concurrent conditions, and this shows an intended cash sale transaction.

Counsel for appellee argues (Br. p. 9) that knowledge of the personnel in the Collection Department of the bank is not imputed to the personnel of the Lending Department in the same bank.

We believe that we have covered this point sufficiently in our opening brief. The noticeable part of appellee’s argument, however, is that appellee is strangely silent on the admission of Mr. Fort, hereinabove quoted, that he did know of the unpaid drafts and that they were being returned on May 19, 1954, the day that he made the loan of \$4,975 upon the two Chevrolets. This evidence refutes counsel’s statements at pages 3 and 10 of appellee’s brief to the effect that there was no evidence that the lending officer’s attention was called to the unpaid drafts. Counsel’s citation of findings numbers 16 and 17, which he pre-

pared, does not strengthen his contention. Finding No. 16 refers to a period of time "Prior to May 19, 1953." The latter portion of finding No. 17 is in direct conflict with Mr. Fort's own admission above quoted, for it is shown that Mr. Fort knew on May 19th that the drafts were being returned unpaid and the credit for the money loaned was not entered upon the bank's records until May 21st. [R. 120, 114-115.] Aside from actual notice the bank, including the lending officer, was chargeable with notice of the unpaid drafts and their contents.

It seems to us to be a most unusual, indifferent and careless act for a bank to loan a person money upon an automobile which the bank knows is not paid for, and on the same day return the unpaid automobile purchase drafts to the seller. And another point which strikes us as rather unusual and which smacks of carelessness on the part of the bank is the length of time these April 2nd drafts were held without, in so far as the evidence shows, communicating the failure to collect to the person or bank sending the draft. More prompt action upon the part of the appellee bank in either communicating the facts to the sender of the drafts or an earlier return of same would have enabled Motores to take prompt action which would have prevented the bankrupt from encumbering the automobiles in question before California titles were secured.

Counsel argues that there can be no actionable negligence in the absence of a duty on the part of the bank to the appellant. There most certainly can be negligence on the part of the bank, which will prevent its recovery under Section 3543, Civil Code of California.

Again we emphasize that it is not a question of the duty of the bank to pay the drafts in question, but rather

its negligence in loaning money upon an automobile, which has not been paid for, under the circumstances here.

In answer to appellant's argument on page 11 of its brief, we must remember that, in so far as the evidence shows, the appellee bank knew nothing about the conversation between the bankrupt and appellant which resulted in the muniments of titles being personally delivered to the bankrupt upon his execution and delivery of the drafts to appellant, instead of these documents accompanying the drafts as indicated upon the face of each draft. Here again appellee would like to make use of testimony it caused to be stricken. What would be the natural reaction of any banker who received an automobile purchase draft stating in plain language that "upon presentation of this draft to the bank designated below for collection together with the documents properly executed indicated on the reverse side hereof" pay to (naming payee) \$..... (inserting amount), and instead of finding document such as ownership certificate, registration card and bill of sale, he found blank pieces of paper in the envelope? Would not the question immediately arise in one's mind as to where the muniments of title were? Whether through neglect or oversight they were not enclosed or whether they had been stolen or lost, and then within a given period, say one month or one and one-half months the maker of the draft appeared at the bank—not with the documents which were supposed to accompany the drafts but instead a California pink slip showing the automobile to be in his name, and then and there made application for a loan upon the automobile described in the draft. Would not the question immediately arise as to where and how the maker of the draft secured the California pink slip, and more especially without the payment of the purchase draft? And would not the question arise in the mind of

the reasonably prudent person as to the propriety of the maker of the draft borrowing money upon property which he has not as yet paid for? Should not such facts put a reasonably prudent person upon inquiry? If the bank ever made such inquiry it is not disclosed from the evidence, and the bank was under no compulsion to make the loans in question.

Appellee argues in one paragraph that the effect of the transaction between the Bankrupt and Motores was a credit transaction and in the next paragraph cites Finding 17, finding as a fact that "as between Motores and the bankrupt it was intended that the sales be sales for cash."

Before passing from Finding 17, one of the most glaring errors in this finding is [R. 68] to the effect that the bankrupt intended to fulfill his promise that the drafts would be paid promptly upon presentation to the bank the same as a check, at the time the promise was made, and yet Motores was prevented by objection of appellee from securing from Resnick [R. 131] an admission that he lied to Luken on April 2 about the payment of the March drafts. Counsel for the appellee bank say this makes no difference for Luken testified to this fact without contradiction, but counsel overlooks the fact that all of this evidence was also stricken upon his motion. Furthermore, it would seem that an admission upon the part of Resnick that he falsely represented to Luken that all March drafts had been taken care of on the very day that he was issuing further worthless drafts for cars would be very material in determining Resnick's fraudulent intent.

Just what acts of the appellant in the transaction (App. Br. p. 13) were designated to induce the bank to extend credit on the faith of the title documents, we do not know.

In so far as the record shows, no acts of appellant, good, bad or indifferent were communicated to the bank other than those the drafts disclosed.

We cannot agree that Finding 15 is supported by the evidence. We contend that the purchase drafts bear all the earmarks of a cash sale, and that the bank had and was charged with knowledge of the contents of the drafts.

Appellee, in answer to appellant's argument at page 14 of its brief says:

"In answer to this contention we again point out that Appellant voluntarily relinquished the title documents to the Bankrupt for the specific purpose of enabling the Bankrupt to borrow money on the security thereof. It is a fair conclusion that if inquiry had been made, this fact would have been made known to the Bank."

Again we emphasize that appellant only consented that the bankrupt borrow money on the cars for the expressed purpose of paying the drafts promptly, upon presentation to the bank. Therefore, had the bank inquired of Motores at the times the loans were requested, which was a month to a month and a half after the drafts had been issued, and the bank had informed Motores, for example, on May 19th, that the drafts of March 6th were still unpaid, it is not difficult to imagine what Motores would have said or done, and more especially in view of Resnick's statement to Motores on April 2nd that the March drafts had been paid. This would have given Motores an opportunity to, and it is reasonable to assume that it would have taken immediate steps to protect its property.

In answer to the argument that appellant could have protected itself by having the muniments of titles attached

to the drafts or the enclosure thereof in the draft envelope, appellee loses sight of the fact that these documents were obtained upon false representations to the effect that the drafts would be paid immediately upon presentation to the bank, the same as a check; on April 2nd that the drafts for March had been taken care of, and that the automobiles had to cross the International Border and these documents were essential to clear the passage of the automobiles. Mr. Luken testified that this was one of the reasons for the delivery of the muniments of title to the bankrupt.

Appellee, in the last paragraph of its brief on page 15, would lead the Court to believe that Motores had knowledge of the return of the March 6th drafts on March 18th in spite of Mr. Luken's uncontradicted testimony to the contrary [R. 142-143], and Finding 12 does not fasten knowledge of the return of these drafts on Motores and if it did, it would be contrary to all the evidence in the case. There is no evidence, as insinuated by appellee, that "appellant saw fit to re-submit the drafts (or March 6) for collection a second time." All the evidence is to the contrary, and shows that Motores believed the March drafts were paid at the time of the delivery of the cars on April 2nd. In fact Resnick told him on April 2nd that all March drafts had been taken care of.

POINT C.

Under the above heading on page 16 of appellee's brief, it contends that the conversations between the bankrupt and Motores were irrelevant as to the bank, and were properly stricken, and as authority therefor cites the same cases as cited by the Referee in his Memorandum Opinion. [R. 51.]

We have covered this question in Point Four, page 31, of our opening brief, also Appendix V, page 22, except

that we now observe for the first time that we, through oversight, failed to have printed on page 23 of Appendix V of our opening brief, the comments of the Court in the case of *Wilcox v. Salomone*, 118 Cal. App. 2d 704, covering the exceptions to the hearsay rule. These comments are to be found on page 712 of said decision and are:

“In *Whitlow v. Durst*, 20 Cal. 2d 523, our Supreme Court said at page 524 [127 P. 2d 530]:

“ ‘When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them. (*Williams v. Kidd*, 170 Cal. 631 [151 P. 1, Ann. Cas. 1916E 703]; *Donohue v. Sweeney*, 171 Cal. 388 [153 P. 708]; *De Cou v. Howell*, 190 Cal. 741 [214 P. 444]; see *McBaine*, Admissibility in California of Declarations of Physical or Mental Conditions, 19 Cal. L. Rev. 231, 251.) Likewise, in gift cases declarations made by the grantor before, contemporaneously, and subsequent to the alleged gifts are admissible though the statements be self-serving. (*Sprague v. Walton*, 145 Cal. 228 [78 P. 645].) In alienation of affections cases declarations of an alienated spouse subsequent to the defendant’s alleged tortious acts are admissible as evidence of the spouse’s state of mind. (*Adkins v. Brett*, 184 Cal. 252 [193 P. 251]; *Cripe v. Cripe*, 170 Cal. 91 [148 P. 520].)’

And in *Hansen v. Bear Film Co., Inc.*, 28 Cal. 2d 154 [168 P. 2d 946], the court quoted the foregoing

language from *Whitelow v. Durst*, with approval, and said further, at pages 173-174:

“ ‘Appellants contend that the trial court erred in admitting in evidence oral and written declarations of ownership of the stock and of the company made by Oscar, not within the presence or to the proved knowledge of Josephine, but subsequent to the transfers to her and in derogation of them. (*Chard v. O’Connell* (1936), 7 Cal. 2d 663, 667 [62 P. 2d 369]; *Francoeur v. Betty* (1915), 170 Cal. 740, 747 [151 P. 123]; *Bollinger v. Bollinger* (1908), 154 Pac. 695, 705 [99 P. 196]; *Miller v. Miller* (1942), 55 Cal. App. 2d 199, 207-208 [130 P. 2d 428]; *Taylor v. Bunnell* (1926), 77 Cal. App. 525, 534 [247 P. 240].) However, under well recognized exceptions to the hearsay rule, such declarations made before, at the time of, or subsequent to the transfers, were properly admissible on the issue of delivery to Josephine (and it was found that the instruments were delivered to her), on the issue of a claimed gift, and also to show the intent or state of mind of Oscar.’ ”

As pointed out in our opening brief, these conversations between the bankrupt and Motores were material and proper in determining the question of whether the sale was a cash or credit transaction; whether the property was obtained from Motores upon false and fraudulent representations of the bankrupt.

Similar evidence was properly offered in all the cases cited by counsel for appellee on page 5 of its brief as well as the cases cited in our opening brief.

We have heretofore called the Court’s attention to the difficulty counsel for appellee has in trying to present his case in an intelligent manner without the aid of the stricken evidence. As a matter of fact, it just cannot be done.

And as we have pointed out, many of the findings prepared by Counsel for appellee and signed by the Referee are based upon stricken evidence, and without which the findings have no support whatsoever. It is difficult to imagine what the facts in this case would sound like without the aid of the stricken evidence. Its elimination just doesn't make sense, and is plain error.

Appellant's Point II.

It would appear that we have fully covered the point here raised. In answer to appellee's contention on page 19 of its brief, may we again point out that a draft was used instead of a check in *Johnson, et al. v. Robinson, et al.*, 203 F. 2d 135. Also, there is no evidence that appellee ever saw the Mexican registrations and bills of sale, any finding of the court to the contrary notwithstanding. The appellee saw the California pink slips after the cars had been registered in California. (App. Br. bottom pp. 20-21.)

Appellee cites the case of *Sullivan Co. v. Wells*, 89 Fed. Supp. 317, and cases similar import.

In the case above cited, it would appear that the United States District Court of the State of Nebraska was following the law of that State as announced in a decision of the Nebraska Supreme Court in accordance with the rule of law in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

The State law of California upon the subject, as we have shown in our opening brief, is not in harmony with the Nebraska decisions and therefore such decisions are of little weight.

Appellant's Point III.

Appellant has never contended, and does not now contend that the bank was charged with notice of any fraud by reason of oral misrepresentations to Motores by the bankrupt at Mexicali, Mexico, and which was not communicated to the bank before it parted with value. We do contend, however, that the bank is chargeable with the facts and circumstances of the automobile purchase drafts, paid and unpaid, coming into its possession and with such other information, written or oral, which came to its attention prior to the time that it loaned the money upon the automobiles in question.

Our argument under Point Two of our opening brief at pages 19-20 is first directed at the rule of law announced in *Kamberg v. Springfield Nat'l Bank*, 103 A. L. R. at 306, and the other cases under this heading. We then point out why the bank is chargeable with notice, all of which is based upon the knowledge and information the bank obtained in handling these automobile purchase drafts and in its dealing with the bankrupt.

The appellee's position would have been entirely different had it not been in possession of the facts heretofore referred to which put it upon notice that the automobiles were unpaid for, and also facts which would lead a reasonable person to believe that the sales were intended as cash sales.

At the bottom of page 23 and at page 24 of appellee's brief, it is said:

"Counsel contends in Point 4 of his brief [R. 31-32] that the Court should have permitted the witness Resnick to answer the question as to whether or not he told the Appellant that the March drafts had been

taken care of. It is submitted that the Referee's ruling in excluding this testimony as to the Bank was correct under the authorities cited in Section I, C of this brief. In any event the same matter was covered by the testimony of Mr. Luken. Since the testimony of Mr. Luken on this point is uncontroverted we cannot see how the Appellant was prejudiced by the rejection of the testimony of Mr. Resnick. Mr. Luken testified [R. 147] that 'I asked him how he was with the drafts. He said that everything had been taken care of.' The testimony of Mr. Resnick, the exclusion of which the Appellant now contends was error, was therefore cumulative, whether or not it was material or relevant."

Counsel seems to now contend that the refusal to permit Resnick to answer the question mentioned under Point Four of our opening brief at page 31, if error, was harmless error since Luken testified to the same thing. Counsel seems to forget that his motion to strike this testimony of Luken was granted. But regardless of this, Motores was entitled to Resnick's admission that he had fraudulently represented to Luken that all March drafts had been paid. Such evidence would have refuted the finding by the Court of good faith and intent upon the part of the bankrupt. [See Finding 17, R. 68.] It also goes to the question of whether or not Motores knew of the unpaid March drafts at the time he sold the April 2nd cars. [See Finding 12, R. 65.]

Findings Based Upon Stricken Evidence.

Try hard as counsel for appellee may, he cannot get away from the fact that many of the findings of the Referee (which counsel prepared) are based upon the stricken evidence. Eliminate the stricken evidence and there is absolutely no evidence to support the findings men-

tioned at page 24 of appellee's brief, and commented upon, beginning page 34 of our opening brief.

Answering appellee's argument under "Conclusion," if one of the significant points in the case "was the delivery of the possession of the cars and the title documents by the appellant to the bankrupt *with the intent that the bankrupt should 'Floor' with the bank*" (emphasis added), then counsel for the appellee made a serious mistake in moving to strike the testimony which wrecked this valuable point.

Conclusion.

We have freely commented upon and quoted the evidence which was stricken by the Court for without it the factual situation here would not make sense. It would be difficult, indeed, to make an intelligent statement of the case without resort to the stricken evidence. This, it seems to us, demonstrates one well founded reason why the motion to strike should have been denied.

For the reasons mentioned in our briefs, it is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

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No. 14398

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for the Ninth Circuit

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HAROLD HOPKINS,

Appellants,

vs.

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Transcript of Record

Appeal from the United States District Court for the
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FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellee,



United States District Court, Western District of
Washington, Northern Division

No. 48570

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER DESIMONE, JOHN STEPICH,
HAROLD HOPKINS, RUSSELL W. FEL-
TON, and BERT DePIERRIS,

Defendants.

INDICTMENT

The Grand Jury charges:

Count I.

That during the period commencing June 30, 1951, and ending May 8, 1952, at Seattle, in the Northern Division of the Western District of Washington, Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris did unlawfully conspire to and with one another, and with divers other persons to the Grand Jury unknown, to commit an offense against the United States, to wit, to wilfully and unlawfully carry on the business of a retail liquor dealer, and in so doing to wilfully fail to pay the tax required by law, contrary to the provisions of Title 26, U.S.C., Section 3253; and in furtherance of said conspiracy the said defendants, for the purpose of effecting the

objects of the conspiracy, did commit the following:

Overt Acts

1. On or about July 1, 1951, the said defendants, using the name White Center Athletic Club, a corporation controlled by them, and of which thereof the defendants were officers, took over and equipped and occupied the premises and the building at 9616 17th Avenue S.W., Seattle, Washington, ostensibly as a social club, but in truth and in fact as a place for the sale of liquor at retail.

2. On or about January 18, 1952, the defendants herein, using the name of White Center Athletic Club, purchased and stored on the premises at 9616 17th Avenue S.W., Seattle, Washington, 53 bottles of liquor.

3. On or about March 1, 1952, the said defendants herein, using the name of White Center Athletic Club, purchased and stored on the premises at 9616 17th Avenue S.W., Seattle, Washington, 152 bottles of liquor.

4. On or about March 12, 1952, the said defendants herein, using the name of White Center Athletic Club, purchased and stored on the premises at 9616 17th Avenue S.W., Seattle, Washington, 56 bottles of liquor.

5. On or about January 16, 1952, at Seattle, Washington, the defendant Bert DePierris sold whiskey by the glass to one Ted King.

6. On or about January 16, 1952, at Seattle, Washington, the defendant Bert DePierris sold whiskey by the glass to Berch D. West.

7. On or about February 15, 1952, at Seattle, Washington, the defendant Bert DePierris sold whiskey by the glass to Berch D. West.

8. On or about May 6, 1952, at Seattle, Washington, the defendant Russell W. Felton sold whiskey by the glass to H. E. Daggett.

9. On or about May 7, 1952, at Seattle, Washington, the defendant Russell W. Felton sold whiskey by the glass to H. E. Daggett.

All in violation of Title 18, U.S.C., Section 371.

A True Bill.

/s/ S. J. CALDERHEAD,

/s/ J. CHARLES DENNIS,

United States Attorney;

/s/ RICHARD D. HARRIS,

Asst. United States Attorney.

(Bail \$500, each.)

[Endorsed]: Filed Sept. 26, 1952.

[Title of District Court and Cause.]

BILL OF PARTICULARS

Comes Now the above-entitled defendants and by and through their attorney, John F. Dore, moves

this Honorable Court for an order requiring plaintiff to furnish a Bill of Particulars in the following:

1. Specify in what manner and where the named defendants did unlawfully conspire with one another.

2. Specify and name the "divers other persons to the grand jury unknown."

3. As to Overt Act No. 1, state more specifically exactly which defendants controlled the corporation named the White Center Athletic Club.

4. And also as to Overt Act No. 1, specify which, if any, of the defendants were officers of this corporation.

5. As to Overt Act No. 2, specify which defendant or defendants, if not all of the defendants herein, purchased and stored on the premises 53 bottles of liquor.

6. As to Overt Act No. 3, specify the name of the defendant or defendants who used the name of the White Center Athletic Club to purchase 152 bottle of liquor.

7. As to Overt Act No. 3, name the defendant or defendants who stored on the premises 152 bottles of liquor.

8. As to Overt Act No. 4, specify the name of the defendant or defendants herein who used the name of the White Center Athletic Club to purchase 56 bottles of liquor.

9. Further as to Overt Act No. 4, specify and name the defendant or defendants who stored said 56 bottles of liquor on the premises and also name the place where said liquor was stored, if any.

10. As to Overt Act No. 6, specify where the defendant Bert DePierris sold whiskey by the glass to Berch D. West.

11. As to Overt Act No. 6, further specify approximately the exact time when the defendant Bert DePierris allegedly sold whiskey by the glass to Berch D. West.

12. As to Overt Act No. 6, and also No. 7, specify whether Berch D. West is a regular employee of the Washington State Liquor Board or whether he is a Federal employee in this instance.

13. As to Overt Act No. 7, specify approximately the exact time and place where Bert DePierris allegedly sold whiskey by the glass to Berch D. West.

14. As to Overt Act No. 8, specify approximately the exact time and place where Russell W. Felton, a defendant, allegedly sold whiskey by the glass to H. E. Daggett.

15. Further as to Overt Act No. 8, specify whether H. E. Daggett is a regular employee of the Washington State Liquor Board or whether he is a Federal employee in this instance.

16. As to Overt Act No. 9, specify approximately the exact time and the place where the defendant

Russell W. Felton, allegedly sold whiskey by the glass to H. E. Daggett.

/s/ JOHN F. DORE,
Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 21, 1952.

[Title of District Court and Cause.]

MOTION TO STRIKE AND TO DISMISS

Come now the above-entitled defendants, by and through their attorney John F. Dore, and move this Honorable Court for an order striking from the indictment certain language, to wit: On Page 1, line 18 of the indictment reading "and with divers other persons to the Grand Jury unknown," for the reason that such language is surplussage, prejudicial and unfair to the defendants

Defendants further move that if said language is not readily subject to being obliterated or deleted from said indictment, that the indictment be dismissed and that the grand jury be required to consider a new and proper indictment.

/s/ JOHN F. DORE,
Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 24, 1952.

[Title of District Court and Cause.]

MOTION TO SUPPRESS

Come Now the above-entitled defendants by and through their attorney John F. Dore, and move this Honorable Court for an Order suppressing the evidence seized in this case by both the State and Federal authorities, for the reason that the seizure of said evidence was unlawful, against the will of the defendants, and was contrary to the Constitution of the United States of America. That said property was seized contrary to the will of the petitioners herein and without a search warrant and without lawful means.

Petitioners further move that said evidence shall not only be suppressed, but shall be returned to them. Petitioners further moves that any evidence or testimony concerning this evidence which has been unlawfully seized be quashed and denied admission in the trial of the defendant petitioners.

In support of this motion, affidavits will be filed later.

/s/ JOHN F. DORE,
Attorney for Petitioners.

Copy served.

[Endorsed]: Filed Dec. 6, 1952.

[Title of District Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY

It Is Hereby Stipulated between the plaintiff, United States of America, and Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris, defendants, and George J. Toulouse, Jr., and John Spiller, their attorneys, that trial by jury in the above-entitled cause be waived and that said cause be tried to the Court.

Signed at Seattle, Washington, this 21st day of April, 1954.

UNITED STATES OF
AMERICA,
Plaintiff,

By /s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ RICHARD D. HARRIS,
Asst. United States Attorney.

/s/ PETER DESIMONE,
/s/ JOHN F. STEPICH,
/s/ HAROLD HOPKINS,
/s/ RUSSELL W. FELTON,
/s/ BERT DePIERRIS,
Defendants.

/s/ GEORGE J. TOULOUSE, Jr.,
/s/ JOHN SPILLER,
Attorneys for Defendants.

It Is So Ordered this 21st day of April, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

[Endorsed]: Filed April 21, 1954.

[Title of District Court and Cause.]

MOTION FOR DISMISSAL OF INDICTMENT

The several defendants above named move that the indictment be dismissed upon the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The indictment is vague, indefinite and uncertain and does not fully inform the defendants of the charge made against them.

3. The indictment is bad for ambiguity in that it is impossible to determine from the language of the charging count whether it was in connection with the alleged conspiracy or with the alleged carrying on of the business of a retail liquor dealer that there was an alleged failure to pay the tax required under title 26, U.S.C., section 3253.

4. There is no such offense as unlawfully conspiring "to carry on the business of a retail liquor dealer, and in so doing" (that is to say in so conspiring) "to wilfully fail to pay the tax required by" title 26, U.S.C., section 3253.

5. There is no such offense as unlawfully conspiring "to carry on the business of a retail liquor dealer, and in so doing" (that is to say in carrying on the said business) "to wilfully fail to pay the tax required by" title 26, U.S.C., section 3253.

6. The patent ambiguity in the charging count of the indictment will prevent the court and jury from dealing with the charge against the defendants with certainty, and will seriously handicap the defendants, and each of them, in making their defense thereto.

7. The charging count of the indictment is not sufficient in form or substance that the defendants, or any one of them, could thereafter plead a judgment of conviction in bar to another prosecution for the same offense.

/s/ GEORGE J. TOULOUSE, JR.,

/s/ JOHN SPILLER,

Attorneys for Defendants.

[Endorsed]: Filed April 21, 1954.

[Title of District Court and Cause.]

MOTION TO EXTEND THE TIME FIXED BY
THE COURT FOR THE SETTLEMENT
AND SIGNING OF SPECIAL FINDINGS
OF FACT AND SENTENCE

Come now the defendants and move the Court for an order extending the time of the entry of

the special findings of fact in the above-entitled matter, heretofore fixed by the Court to be May 10, 1954, to May 24, 1954.

This Motion is based on the records and files herein and the affidavit of George J. Toulouse, Jr., appended hereto.

JOHN SPILLER, and

GEORGE J. TOULOUSE, JR.,

Attorneys for Defendants.

State of Washington,
County of King—ss.

George J. Toulouse, Jr., being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the above-named defendants; that he has requested the court reporter of the above-entitled court to prepare a transcript of the record of proceedings herein in order that it might be available to counsel for the preparation of special findings of fact, as provided by the rules in criminal procedure; that said court reporter has advised your affiant that she will be unable to prepare a transcript of the record and have it available for examination by counsel prior to May 10th, 1954. That counsel feel that a transcript of the record is absolutely necessary in this case in order to insure an accurate preparation of the special findings of fact to which the defendants are entitled.

Further, your affiant sayeth not.

/s/ GEORGE J. TOULOUSE, JR.

Subscribed and sworn to before me this 3rd day of May, 1954.

/s/ JOHN SPILLER,

Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

REQUEST FOR SPECIAL FINDINGS OF FACT

Pursuant to rule 23, Federal Rules of Criminal Procedure, the defendants above named, by and through their attorneys of record, George J. Toulouse, Jr., and John Spiller, respectfully request the Honorable John C. Bowen, the judge of the above-entitled court before whom the above-entitled cause was tried without a jury, to make and enter herein special findings of fact from the evidence respecting the following particulars: (1) the specific design, plan, purpose or object of the agreement, concert or cooperation among the participants constituting an essential element of the conspiracy as alleged in the indictment herein; (2) the date or approximate date when the conspiracy alleged in

the indictment was originally formed; (3) which of the defendants above named originally entered into or participated in the formation of the conspiracy alleged in the indictment; (4) which other persons, known or unknown, originally entered into or participated in the formation of the conspiracy alleged in the indictment; (5) which of the defendants above named joined the conspiracy alleged in the indictment subsequent to the original formation thereof, and the date or approximate date of each such subsequent joining; (6) which other persons, known or unknown, joined the conspiracy alleged in the indictment subsequent to the original formation thereof, and the date or approximate date of each such subsequent joining; (7) the several acts of each of the defendants above named proving or tending exclusively to prove participation by the respective defendants in the conspiracy alleged in the indictment; (8) the several overt acts of each of the defendants above named alleged in the indictment as to which there has been a failure of proof.

/s/ GEORGE J. TOULOUSE, JR.,

/s/ JOHN SPILLER,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

SPECIAL FINDINGS OF FACT

Pursuant to the request of the defendants above named, made by their attorneys of record, George J. Toulouse, Jr. and John Spiller, under rule 23 of the Federal Rules of Criminal Procedure, the undersigned Judge of the above-entitled court, makes the following special findings of fact from the evidence adduced and admitted in the course of the trial of the above-entitled cause:

I.

That the said evidence neither proves nor tends exclusively to prove that there was a specific design, plan, purpose or object of any agreement, concert or cooperation among the said participants constituting an essential element of conspiracy as alleged in the indictment herein.

II.

That the said evidence neither proves nor tends exclusively to prove the date or approximate date when a conspiracy as alleged in the indictment herein was originally formed.

III.

That the said evidence neither proves nor tends exclusively to prove which of the defendants above named originally entered into or participated in the formation of a conspiracy, as alleged in the indictment herein.

IV.

That the said evidence neither proves nor tends exclusively to prove which other persons, known or unknown, originally entered into or participated in the formation of a conspiracy, as alleged in the indictment herein.

V.

That the said evidence neither proves nor tends exclusively to prove which of the defendants above named joined a conspiracy, as alleged in the indictment herein, subsequent to the original formation thereof, or the date or approximate date of any such subsequent joining.

VI.

That the said evidence neither proves nor tends exclusively to prove which other persons, known or unknown, joined a conspiracy, as alleged in the indictment herein, subsequent to the original formation thereof, or the date or approximate date of any such subsequent joining.

VII.

That the said evidence neither proves nor tends exclusively to prove that the defendant Peter Desimone, in concert with one or more of the other defendants above named, or in concert with any other person or persons, known or unknown, committed any overt act whatsoever in pursuance of a conspiracy, as alleged in the indictment herein.

VIII.

That the said evidence neither proves nor tends exclusively to prove that the defendant John Step-

ich, in concert with one or more of the other defendants above named, or in concert with any other person or persons, known or unknown, committed any overt act whatsoever in pursuance of a conspiracy, as alleged in the indictment herein.

IX.

That the said evidence neither proves nor tends exclusively to prove that the defendant Harold Hopkins, in concert with one or more of the other defendants above named, or in concert with any other person or persons, known or unknown, committed any overt act whatsoever in pursuance of a conspiracy, as alleged in the indictment herein.

X.

That the said evidence neither proves nor tends exclusively to prove that the defendant Russell W. Felton, in concert with one or more of the other defendants above named, or in concert with any other person or persons, known or unknown, committed any overt act whatsoever in pursuance of a conspiracy, as alleged in the indictment herein.

XI.

That the said evidence neither proves nor tends exclusively to prove that the defendant Bert De-Pierris, in concert with one or more of the other defendants above named, or in concert with any other person or persons, known or unknown, committed any overt act whatsoever in pursuance of a conspiracy, as alleged in the indictment herein.

XII.

That there has been a complete and utter failure of proof with respect to the allegations set forth in overt acts numbered 1, 2, 3, 4 and 5, as set forth in the indictment herein.

XIII.

That the alleged overt acts numbers 6, 7, 8 and 9, as set forth in the indictment herein, together with any and all other overt acts disclosed by the evidence herein, taken individually or together, are not inconsistent with the hypothesis of innocence on the part of each and every one of the defendants above named of the charge of conspiracy, as set forth in the indictment herein.

Done In Open Court this day of May, 1954.

.....,

Judge.

Presented by

/s/ JOHN SPILLER,

Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

GENERAL FINDING AND SPECIAL FINDINGS OF FACT

General Finding

The above-entitled Court finds the defendants Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris guilty as charged in Count I of the Indictment.

Special Findings of Fact

The above-entitled Court finds the following:

I.

That during the period commencing June 30, 1951, and ending May 8, 1952, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris did unlawfully conspire to and with one another, and with divers other persons (to wit, Charolette Fulford) to commit an offense against the United States, to wit, to wilfully and unlawfully carry on the business of a retail liquor dealer, and in so doing to wilfully fail to pay the tax required by law, contrary to the provisions of Title 26, U.S.C., Sec. 3253.

II.

That Sec. 3253 of Title 26, U.S.C., and Sec. 371 of Title 18, U.S.C., were in full force and effect at Seattle, in the Northern Division of the Western

District of Washington during the period commencing June 30, 1951, and ending May 8, 1952.

III.

That in the furtherance of the said conspiracy, and for the purpose of effecting the objects of the said conspiracy, the defendants Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris did commit the following overt acts that were alleged in the Indictment:

1. That on or about July 1, 1951, Peter Desimone, John Stepich and Harold Hopkins, using the name White Center Athletic Club, Inc., a corporation, controlled by them, and of which thereof the said Peter Desimone, John Stepich and Harold Hopkins were officers, took over and equipped and occupied the premises and building located at 9616 17th Ave. S.W., Seattle, Washington, ostensibly as a social club, but in truth and in fact as a place for the sale of liquor at retail.

2. That on or about January 18, 1952, Bert DePierris, while John Stepich was present, sold and stored liquor at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, the amount of liquor stored at said time and place being approximately 150 bottles belonging to the said White Center Athletic Club., Inc.

3. That on or about March 1, 1952, the said defendants Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris, using the name White Center Athletic Club, Inc.,

stored on the premises located at 9616 17th Ave. S.W. Seattle, Washington, approximately 50 bottles of liquor which they claimed belonged to the Dr. Edward Lincoln Smith Orthopedic Guild, but which in fact belonged to said defendants.

4. That on or about March 12, 1952, the said defendants Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris, using the name White Center Athletic Club, Inc., stored on the premises located at 9616 17th Ave. S.W., Seattle, Washington, approximately 150 bottles of liquor belonging to said defendants.

5. That on or about January 16, 1952, at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, the defendant Bert DePierris sold whiskey by the glass to Berch D. West.

6. That on or about February 15, 1952, at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., the defendant Bert DePierris sold whiskey by the glass to Berch D. West.

7. That on or about May 6, 1952, at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, the defendant Russell W. Felton sold whiskey by the glass to H. E. Daggett.

8. That on or about May 7, 1952, at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., the defendant Russell W. Felton sold whiskey by the glass to H. E. Daggett.

IV.

That in addition to the overt acts found by the Court in paragraph III of these Special Findings of Fact, the Court finds that the following additional overt acts were committed by the defendants Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris:

1. That during the period commencing June 30, 1951, and ending May 8, 1952, there was filed with the Wage and Excise Tax Division of the Federal Government at Tacoma, Washington, certain official forms by the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, listing the defendants Peter Desimone, John Stepich and Harold Hopkins as officers of said corporation.

2. That during the period commencing June 30, 1951, and ending May 8, 1952, there was filed with the Tax Commission of the state of Washington, at Olympia, Washington, certain official forms by the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, listing the defendants Peter Desimone, John Stepich and Harold Hopkins as officers of said corporation.

3. That on or about March 31, 1952, at Seattle, Washington, the defendant Harold Hopkins, subscribed and swore before a notary public of the State of Washington residing at Seattle, Washington, that he, the said Harold Hopkins, was the Secretary-Treasurer of the said White Center Athletic Club, Inc., a corporation.

4. That on or about October 20, 1951, at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, the defendant Peter Desimone did interrogate and allow to enter onto the said premises Berch D. West, and the defendant Russell W. Felton, at approximately the same time and at the same place, sold whiskey by the glass to the said Berch D. West.

5. That on or about October 26, 1951, the said defendants Peter Desimone, John Stepich, Harold Hopkins and Russell W. Felton, using the name White Center Athletic Club, Inc., stored on the premises located at 9616 17th Ave. S.W., Seattle, Washington, approximately 420 bottles of liquor.

6. That on or about January 30, 1952, at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, the defendant Bert DePierris sold whiskey by the glass to Berch D. West.

7. That on or about February 4, 1952, at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, the defendants Peter Desimone and Bert DePierris sold whiskey by the glass, and at the same time and place the defendant Harold Hopkins was acting as doorman at said White Center Athletic Club, Inc.

8. That approximately three weeks prior to February 29, 1952, and within the period covered in this Indictment, the defendant Harold Hopkins ad-

vised Mrs. Frederick Schwier at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, that the Doctor Edward Lincoln Smith Orthopedic Guild of which Mrs. Schwier was a member, that the said White Center Athletic Club, Inc., would serve liquor to her party and charge 50c a drink for bar liquor and 65c for cocktails.

9. That on or about February 29, 1952, at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., the defendants Russell W. Felton and Bert DePierris sold whiskey by the glass.

10. That on or about March 9, 1952, at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, the defendant Bert DePierris sold whiskey by the glass to Berch D. West and Rodderick Whittall, and at the approximate same time and place the defendant Russell W. Felton ordered both Berch D. White and Rodderick Whittall to leave the said White Center Athletic Club, Inc., and the premises occupied thereby.

11. That on or about April 6, 1952, the said defendants Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris, using the name of White Center Athletic Club, Inc., stored liquor on the premises located at 9616 17th Ave. S.W., Seattle, Washington, approximately 22 bottles of liquor.

12. That on or about May 6, 1952, at the said White Center Athletic Club, Inc., located at 9616 17th Ave. S.W., Seattle, Washington, the defendant John Stepich did interrogate and allow to enter onto said premises H. E. Daggett.

13. That on or about May 7, 1952, at the said White Center Athletic Club, Inc., located at 9616 17th Ave., S.W., Seattle, Washington, the defendant John Stepich did act as a coin change cashier for the operation of slot machines located on said premises.

Done In Open Court this 17th day of May, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and Approved by:

/s/ RICHARD D. HARRIS,
Asst. United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1954.

United States District Court, Western District
of Washington, Northern Division

No. 48,570

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER DESIMONE,

Defendant.

JUDGMENT, SENTENCE AND
COMMITMENT

On this 17th day of May, 1954, the attorney for the Government, and the defendant, Peter Desimone, appearing in person and being represented by John Spiller and George J. Toulouse, Jr., his attorneys, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Count I thereof, there being only one count in the Indictment herein; that the Probation Officer of this district has made a presentence investigation and report to the Court, now, therefore,

It Is Adjudged that the defendant, Peter Desimone, having waived a jury, has been tried and convicted by the Court and was found guilty of the offense of violation of Sec. 3253, Title 26, U.S.C., and Sec. 371, Title 18, U.S.C., as charged in Count I of the Indictment, and the Court having asked the defendant whether he has anything to say why

judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that as to Count I the defendant is guilty as charged in Count I of the Indictment and is convicted.

It Is Adjudged and Ordered that as to Count I the defendant be committed to the custody of the Attorney General of the United States for confinement in the United States Penitentiary at McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Eighteen (18) Months.

It Is Further Ordered that the Clerk of this court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 17th day of May, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and Approved by:

/s/ RICHARD D. HARRIS,

Asst. U. S. Attorney.

(Conspiracy to violate and violation of Sec. 3253, T. 26, U.S.C.—unlawfully carrying on business of retail liquor dealer.)

Entered in Criminal Docket May 18, 1954.

[Endorsed]: Filed May 17, 1954.

United States District Court, Western District
of Washington, Northern Division

No. 48,570

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN STEPICH,

Defendant.

JUDGMENT, SENTENCE AND
COMMITMENT

On this 17th day of May, 1954, the attorney for the Government, and the defendant, John Stepich, appearing in person and being represented by John Spiller and George J. Toulouse, Jr., his attorneys, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Count I thereof, there being only one count in the Indictment herein; that the Probation Officer for this district has made a pre-sentence investigation and report to the Court, now, therefore,

It Is Adjudged that the defendant, John Stepich, having waived a jury, has been tried and convicted by the Court and was found guilty of the offense of violation of Sec. 3253, Title 26, U.S.C., and Sec. 371, Title 18, U.S.C., as charged in Count I of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause

to the contrary being shown or appearing to the Court,

It Is Adjudged that as to Count I the defendant is guilty as charged in Count I of the Indictment and is convicted.

It Is Adjudged and Ordered that as to Count I the defendant be committed to the custody of the Attorney General of the United States for confinement in the King County Jail at Seattle, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Fifteen (15) Days, and further, that the defendant shall pay a fine to the United States of America in the sum of Fifteen Hundred (\$1,500.00) Dollars, and shall stand committed until paid.

It Is Further Ordered that the Clerk of this court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 17th day of May, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and Approved by:

/s/ RICHARD D. HARRIS,

Asst. United States Attorney.

(Conspiracy to violate and violation of Sec. 3253, T. 26, U.S.C.,—unlawfully carrying on business of retail liquor dealer.)

[Endorsed]: Filed May 17, 1954.

United States District Court, Western District
of Washington, Northern Division

No. 48,570

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAROLD HOPKINS,

Defendant.

JUDGMENT, SENTENCE AND
COMMITMENT

On the 17th day of May, 1954, the attorney for the Government, and the defendant, Harold Hopkins, appearing in person and being represented by John Spiller and George J. Toulouse, Jr., his attorneys, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Count I thereof, there being only one count in the Indictment herein; that the Probation Officer for this district has made a presentence investigation and report to the Court, now, therefore,

It Is Adjudged that the defendant, Harold Hopkins, having waived a jury, has been tried and convicted by the Court and was found guilty of the offense of violation of Sec. 3253, Title 26, U.S.C., and Sec. 371, Title 18, U.S.C., as charged in Count I of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no suffi-

cient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that as to Count I the defendant is guilty as charged in Count I of the Indictment and is convicted.

It Is Adjudged and Ordered that as to Count I the defendant be committed to the custody of the Attorney General of the United States for confinement in the King County jail at Seattle, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Fifteen (15) Days, and further, that the defendant shall pay a fine to the United States of America in the sum of Twelve Hundred (\$1,200.00) Dollars, and shall stand committed until paid.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done In Open Court this 17th day of May, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and Approved by:

/s/ RICHARD D. HARRIS,

Asst. United States Attorney.

(Conspiracy to violate and violation of Sec. 3253, T. 26, U.S.C.—unlawfully carrying on business of retail liquor dealer.)

[Endorsed]: Filed May 17, 1954.

United States District Court, Western District of
Washington, Northern Division

No. 48570

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL W. FELTON,

Defendant.

JUDGMENT, SENTENCE AND ORDER
OF PROBATION

On this 17th day of May, 1954, the attorney for the Government, and the defendant, Russell W. Felton, appearing in person and being represented by John Spiller and George J. Toulouse, Jr., his attorneys, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Count I thereof, there being only one count in the Indictment herein; that the Probation Officer for this district has made a presentence investigation and report to the Court, now, therefore,

It Is Adjudged that the defendant, Russell W. Felton, having waived a jury, has been tried and convicted by the Court and was found guilty of the offense of violation of Sec. 3253, Title 26, U.S.C., and Sec. 371, Title 18, U.S.C., as charged in Count I of the Indictment, and the Court having asked

the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that as to Count I the defendant is guilty as charged in Count I of the Indictment and is convicted.

It Is Adjudged and Ordered that as to Count I the defendant, Russell W. Felton, be committed to the custody of the Attorney General of the United States for confinement in the King County jail at Seattle, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Thirty (30) Days.

It Is Further Ordered and Adjudged that the execution of the sentence herein be and hereby is Suspended and the defendant is placed on probation for a period of One (1) Year, commencing this date, upon the following conditions:

1. The defendant shall not unlawfully possess, handle or dispose of intoxicating liquor in any form whatsoever.

2. The defendant shall be placed upon probation as provided by the statutes of the United States relative to probation during his good behavior and until further order of the Court and upon the express condition that said defendant does not during said probationary period violate any law of the United States or of any state or community where he may be, and shall report regularly to the

United States Probation Officer at the times and in the manner said Officer shall direct.

Done In Open Court this 17th day of May, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and Approved by:

/s/ RICHARD D. HARRIS,
Asst. United States Attorney.

[Endorsed]: Filed May 17, 1954.

United States District Court, Western District of
Washington, Northern Division
No. 48570

UNITED STATES OF AMERICA,
Plaintiff,
vs.
BERT DePIERRIS,
Defendant.

JUDGMENT, SENTENCE AND ORDER
OF PROBATION

On this 17th day of May, 1954, the attorney for the Government, and the defendant, Bert DePierris, appearing in person and being represented by John Spiller and George J. Toulouse, Jr., his attorneys, the Court finds the following:

That prior to the entry of his plea, a copy of the

Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Count I thereof, there being only one count in the Indictment herein; that the Probation Officer for this district has made a presentence investigation and report to the Court; now, therefore,

It Is Adjudged that the defendant, Bert DePierris, having waived a jury, has been tried and convicted by the Court and was found guilty of the offense of violation of Sec. 3253, Title 26, U.S.C., and Sec. 371, Title 18, U.S.C., as charged in Count I of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that as to Count I the defendant is guilty as charged in Count I of the Indictment and is convicted.

It Is Adjudged and Ordered that as to Count I the defendant, Bert DePierris, be committed to the custody of the Attorney General of the United States for confinement in the King County jail at Seattle, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Sixty (60) Days.

It Is Further Ordered and Adjudged that the execution of the sentence herein be and hereby is Suspended and the defendant is placed on proba-

tion for a period of Two (2) Years, commencing this date, upon the following conditions:

1. The defendant shall not unlawfully possess, handle or dispose of intoxicating liquor in any form whatsoever.

2. The defendant shall be placed upon probation as provided by the statutes of the United States relative to probation during his good behavior and until further order of the Court and upon the express condition that said defendant does not during said probationary period violate any law of the United States or of any state or community where he may be, and shall report regularly to the United States Probation Officer at the times and in the manner said Officer shall direct.

Done in Open Court this 17th day of May, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and Approved by:

/s/ RICHARD D. HARRIS,
Asst. United States Attorney.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now come the defendants Peter Desimone, John Stepich, and Harold Hopkins above named, and each

of them, by and through their attorneys of record, George J. Toulouse, Jr., and John Spiller, and hereby give notice of appeal, and do appeal, from the conviction, judgment and sentence in the above-entitled cause made and entered this 17th day of May, 1954.

/s/ GEORGE J. TOULOUSE, JR.,

/s/ JOHN SPILLER,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL—PETER DESIMONE

Know All Men by These Presents:

That we, Peter Desimone, as principal, and National Automobile & Casualty Insurance Co., a corporation organized and existing under and by virtue of the laws of the State of Washington, as Surety, are held and firmly bound unto the United States of America, in the sum of Two Thousand and no/100 (2000.00) to be paid to the said United States of America, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 17th day of

May, in the year of our Lord, One Thousand Nine Hundred and Fifty-four.

The Condition of the above recognizance is such, that, whereas, lately at a District Court of the United States for the Western District of Washington in a suit pending in said Court, between United States of America vs. Peter Desimone, No. 48570, a judgment was rendered against the said Peter Desimone and the said Peter Desimone having filed in the Clerk's Office of said Court Notice of Appeal in duplicate, from said judgment in the aforesaid suit, and said appeal is now regularly pending in the United States Court of Appeals in and for the Ninth Circuit Court, to be holden at the City of San Francisco in the State of California and Northern District of California,

Now Therefore, if the said Peter Desimone surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case of the judgment be reversed and the cause be remanded for a new trial he appear in the Court to which said cause may be remanded for a new trial and render himself amenable to any and all lawful orders and process in the premises, then this recognizance shall be void, otherwise to remain in full effect and virtue. This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court. As a further condition the defendant is prohibited from leaving the jurisdic-

tion of this Court without authorization of the United States District Judge.

[Seal] /s/ PETER DESIMONE,
NATIONAL AUTOMOBILE & CASUALTY
INSURANCE CO.,

By /s/ CLARENCE DEMAN,
Attorney in Fact.

Approved:

/s/ JOHN C. BOWEN,
U. S. District Judge.

Acknowledged before me and approved the day and year first above written.

/s/ RICHARD D. HARRIS,
Asst. United States Attorney for the Western Dis-
trict of Washington.

[Endorsed]: Filed May 18, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL—JOHN STEPICH

Know All Men By These Presents:

That we John Stepich, as principal, and National Automobile Casualty Insurance Co., a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, are held and firmly bound unto the United States of America, in the sum of Five Hundred and no/100 (\$500.00) to be paid to the said United States of

America, certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the 17th day of May, in the year of our Lord, One Thousand Nine Hundred and Fifty-four.

The Condition of the above recognizance is such that, whereas, lately at a District Court of the United States for the Western District of Washington in a suit pending in said Court, between the United States of America, vs. John Stepich, No. 48570, a judgment was rendered against the said John Stepich and the said John Stepich having filed in the Clerk's Office of said Court Notice of Appeal in duplicate, from said judgment in the aforesaid suit, and said appeal is now regularly pending in the United States Court of Appeals in and for the Ninth Circuit Court, to be holden at the City of San Francisco in the State of California and Northern District of California,

Now, Therefore, if the said John Stepich surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case of the judgment be reversed and the cause be remanded for a new trial he appear in the Court to which said cause may be remanded for a new trial and render himself amenable to any and all lawful orders and process in the premises, then this recognizance shall be void, otherwise to remain in full effect and virtue. This recognizance shall be deemed and con-

strued to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court. As a further condition the defendant is prohibited from leaving the jurisdiction of this Court without authorization of the United States District Judge.

[Seal] /s/ JOHN STEPICH.

NATIONAL AUTOMOBILE & CASUALTY
INSURANCE CO.,

By /s/ CLARENCE DEMAN,
Attorney in Fact.

Approved:

/s/ JOHN C. BOWEN,
U. S. District Judge.

Acknowledged before me and approved the day
and year first above written.

/s/ RICHARD D. HARRIS,
Asst. United States Attorney for the Western Dis-
trict of Washington.

[Endorsed]: Filed May 18, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL—HAROLD HOPKINS

Know All Men By These Presents:

That we, Harold Hopkins, as principal, and National Automobile Casualty Insurance Co., a corporation organized and existing under and by virtue

of the laws of the State of California, as Surety, are held and firmly bound unto the United States of America, in the sum of Five Hundred and no/100 (\$500.00) to be paid to the said United States of America, certain attorney, executors, administrators or assignes, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the 17th day of May, in the year of our Lord, One Thousand Nine Hundred and Fifty-four.

The Condition of the above recognizance is such that, whereas, lately at a District Court of the United States for the Western District of Washington in a suit pending in said Court, between the United States of America, vs. Harold Hopkins No. 48570 a judgment was rendered against the said Harold Hopkins and the said Harold Hopkins having filed in the Clerk's Office of said Court Notice of Appeal in duplicate, from said judgment in the aforesaid suit, and said appeal is now regularly pending in the United States Court of Appeals in and for the Ninth Circuit Court, to be holden at the City of San Francisco in the State of California and Northern District of California,

Now, Therefore, if the said Harold Hopkins surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case of the judgment be reversed and the cause be remanded for a new trial he appear in the Court to which said cause may

be remanded for a new trial and render himself amenable to any and all lawful orders and process in the premises, then this recognizance shall be void, otherwise to remain in full effect and virtue, This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court. As a further condition the defendant is prohibited from leaving the jurisdiction of this Court without authorization of the United States District Judge.

[Seal] /s/ HAROLD HOPKINS.

NATIONAL AUTOMOBILE & CASUALTY
INSURANCE CO.,

By /s/ CLARENCE DEMAN,
Attorney in Fact.

Approved:

/s/ JOHN C. BOWEN,
U. S. District Judge.

Acknowledged before me and approved the day
and year first above written.

/s/ RICHARD D. HARRIS,
Asst. United States Attorney for the Western Dis-
trict of Washington.

[Endorsed]: Filed May 18, 1954.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Now come the above-named defendants, Peter Desimone, John Stepich and Harold Hopkins, hereby giving notice of appeal in the above-entitled cause, and, in compliance with rule 37 of the Federal Rules of Criminal Procedure, set forth the following:

I.

That the title of the above-entitled cause is "United States of America, plaintiff, vs. Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris, defendants."

II.

That the names and addresses of the said defendants are: Peter Desimone, care of Frank Brewster, Longacres Race Track, Renton, Washington; John Stepich, 12229 4th Avenue, S.W., Seattle, Washington; and Harold Hopkins, 9810 42nd Avenue S.W., Seattle, Washington.

III.

That the names and office addresses of the attorneys for the said defendants are: George J. Toulouse, Jr., 805 Arctic Building, Seattle 4, Washington, and John Spiller, 406 Joseph Vance Building, Seattle 1, Washington.

IV.

That the offense charged against said defendants in the indictment in the above-entitled cause was

an unlawful conspiracy to carry on the business of a retail liquor dealer, violative of Title 18, USC, section 3253, and to fail to pay the tax required by Title 26, USC, section 3253.

V.

That by the oral and written judgment of the Honorable John C. Bowen, Judge of the above-entitled court, made and entered herein on May 17, 1954, the defendant, Peter Desimone, was convicted of the crime charged in said indictment and sentenced to serve eighteen months' incarceration at a place of confinement to be designated by the Attorney General of the United States; that by the oral and written judgment of the Honorable John C. Bowen, Judge of the above-entitled court, made and entered herein on May 17, 1954, the defendant, John Stepich, was convicted of the crime charged in said indictment and sentenced to incarceration in the County Jail at King County, Washington, for a period of fifteen days and to payment of a fine in the sum of \$1,500.00; and that by the oral and written judgment of the Honorable John C. Bowen, Judge of the above-entitled court, made and entered herein on May 17, 1954, the defendant Harold Hopkins, was convicted of the crime charged in said indictment and sentenced to incarceration in the County Jail at King County, Washington, for a period of fifteen days and to payment of a fine in the sum of \$1,200.00.

VI.

That the said Peter Desimone, John Stepich and Harold Hopkins, and each of them, hereby appeal the judgment and sentence aforesaid to the United States Circuit Court of Appeals for the Ninth Circuit.

VII.

And that the said appellants, Peter Desimone, John Stepich and Harold Hopkins, are not now confined, being at liberty under bond.

GEORGE J. TOULOUSE, JR.

and

JOHN SPILLER,

By /s/ JOHN SPILLER,

Attorneys for Appellants, Peter Desimone, John Stepich and Harold Hopkins.

Receipt of copy acknowledged.

[Endorsed]: Filed May 26, 1954

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 48570

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER DESIMONE, JOHN STEPICH,
HAROLD HOPKINS, RUSSELL W. FEL-
TON, and BERT DePIERRIS,

Defendants.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL
April 21, 1954, 10:00 A.M.

Appearances:

RICHARD D. HARRIS, ESQ.,
Assistant United States Attorney,
Appeared for Plaintiff; and

GEORGE J. TOULOUSE, JR., ESQ.,
JOHN SPILLER, ESQ.,
Appeared for Defendants.

The Court: I would like to ask in Cause No. 48570 entitled United States of America, Plaintiff, vs. Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton, and Bert DePierris, Defendants,

are the parties and their counsel ready now to proceed with the trial of that case?

Mr. Spiller: We are, your Honor.

Mr. Harris: Yes, your Honor.

The Court: Are there any papers which counsel wish to file?

Mr. Spiller: I would like to be heard briefly upon a motion. [2*]

The Court: You may proceed.

Mr. Spiller: I would like to present to the Court and briefly be heard upon a motion for dismissal of the indictment.

The Court: You may proceed.

Mr. Spiller: I have just served upon counsel for the Government a copy of a motion that I am handing to the bailiff for transmission to the Court. Would the Court prefer to read it first?

The Court: Yes. May I?

(The Court reads document.)

The Court: I wish you would please make your remarks as brief as possible and sufficient, however, to protect your record and to advise the Court in the briefest way possible of the situation mentioned in your motion, Mr. Spiller. I do not wish to hear long argument. I cannot do that. As a matter of fact, these motions should have been made on motion calendar days so that the Court then might already, before this occasion, have disposed of them. Nevertheless, any invalidity of the indictment may be noted by either the litigants through their coun-

sel or the trial judge at any stage of the proceeding.

Try to be brief, Mr. Spiller.

Mr. Spiller: I will do that, if the Court [3] please.

At the outset then, may I say to the Court that the indictment itself, beginning on line 18 of page 1 thereof, says that these individual defendants:

“* * * did unlawfully conspire to and with one another, and with divers other persons to the Grand Jury unknown, to commit an offense against the United States, to wit, to willfully and unlawfully carry on the business of a retail liquor dealer, and in so doing to willfully fail to pay the tax required by law * * *.”

Now, the statute respecting the substantive crime of carrying on the business and failing to pay the tax provides—and I am going to be brief—I am going to elide the unnecessary language there:

“Any person who shall carry on the business of a* * * retail liquor dealer * * * and willfully fails to pay the special tax * * *”

shall be guilty.

Now, it is seriously urged upon the Court that the indictment is faulty in the manner in which it alleges the conspiracy to commit the substantive crime. Now, I am familiar with cases, if the Court please, that permit a certain latitude on the part of the [4] Government in charging crime. On the other hand, the law is settled that the charge itself in the indictment must with clarity and with cer-

tainty advise the defendants, the counsel and the Court of precisely what the charge here is. In this charge in the first place it is impossible to determine from it whether the charge is the conspiracy, the act of conspiracy——

The Court: Will you pause for just a moment?

May I advise counsel there will be another matter which necessarily will have to interrupt these proceedings at 4:00 o'clock this afternoon. You may now proceed with your remarks.

Mr. Spiller: The first real point, to come briefly to it, if the Court please, is that the words "in so doing" which precede the allegation of failing to pay the tax can be read in conjunction either with the act of conspiracy or in conjunction with the alleged act of carrying on the business, and it is respectfully submitted that it is impossible to determine from the face of this pleading precisely what the combination is with respect to which and upon which this one count of the indictment is based.

Now, a second point in that same connection, that read either way the charge of the count results in an absurdity. If the indictment is to be read as [5] charging a conspiracy to carry on the business and in so doing, that is to say in so conspiring, they fail to pay the tax, it is submitted to the Court that in the mere act of a conspiracy attended with nothing more, the failure to pay the tax does not allege and state a crime.

The second point in that connection, that assuming that you read it in connection with the words that they allegedly carried on the business, it

still results in an absurdity. You cannot carry on the business and in the mere act of carrying on the business fail to pay the tax. That requires an additional act of omission and one that is not charged.

The further and third point that the statutory requirement of an allegation as to the carrying on of the business and of a willful failure to pay the tax, those two in conjunction are not here pleaded in the language in which this indictment is framed, and we think that that is a serious bar towards the presentation of a defense in this case.

The Court: Did you wish to add any thoughts, Mr. Toulouse? The Court will hear you briefly, also, if you would like.

Mr. Toulouse: There is only one matter that I might refer to, your Honor. Carefully read, it is my [6] position that since the Government charged a conspiracy and then went on to say:

“* * * to wit, to willfully and unlawfully carry on the business of a retail liquor dealer, and in so doing to willfully fail to pay the tax required by law * * *”

that, in effect, the language that I just read fails to allege that the tax was not paid irrespective of the fact that the cases might hold that the burden is upon the defendants to show that the tax was paid. I still would contend that the indictment does not contend a conspiracy to commit an offense against the United States because it fails to allege that pursuant to the conspiracy that the tax was not paid.

The Court: Does your point involve this result: That you contend that the conspiracy allegation does not allege completion and success in obtaining the objectives of a conspiracy?

Mr. Toulouse: No, your Honor. My point is the conspiracy has to contain two agreements: One, to willfully carry on the business and, in the conjunctive, to willfully fail to pay the tax. That you do not have a conspiracy of that nature alleged. You do not have a conspiracy embracing an agreement to willfully carry on a business and to willfully fail to pay the tax. In [7] short, you could have a conspiracy to willfully carry upon this business, your Honor, and you would have no crime committed. It is only when you had an agreement, a further agreement, between the conspirators to fail to pay the tax, that you have a conspiracy to violate 3253. The language, in saying that the tax was not paid, does not allege an agreement or a conspiracy of the character that would violate 3253. You would have to allege both premises, I repeat, in the conjunctive, that the agreement did embrace both covenants as it were as between all of the conspirators to do two things, to carry on the business and to carry on that business and not pay the tax. They must have agreed to that, and this indictment does not allege that.

Mr. Harris: I wish to resist the motion, your Honor. I wish to state that the indictment in alleging the conspiracy is complete and in conformity with the statutes, and it sets forth the necessary allegations sufficient to constitute an alleged violation.

The Court: The Court does not agree at this stage with the objections to the sufficiency of the indictment which have been stated by counsel in support of the motion for dismissal of the indictment, and for that reason, among others, the motion in all its parts is denied. [8]

Are counsel and the parties now ready to proceed to trial?

Mr. Harris: Yes, your Honor.

Mr. Spiller: Yes, your Honor.

The Court: I wish to remind the defendants that it is necessary that each one of you be present during the trial at all times when the trial is proceeding. Do not leave the room for any purpose of your own. If you must leave the room by reason of illness or anything of that sort, if you will let your counsel speak of it, Court arrangements will be made for you to leave the room if that is necessary. It is possible with a number of persons interested in the same case that any one might unthinkingly leave the room, and if so, maybe the attorneys in the case might not notice or, or the trial judge might not notice it, but the law requires that the case not proceed in the absence of any defendant, and I ask the defendants to cooperate with the Court in seeing that no such thing happens that would violate the law.

At this time it is appropriate for the respective litigants to make an opening statement of what they think the proof in the case will be. We will first hear plaintiff's opening statement of what plaintiff thinks the proof will be in this case. [9]

(Mr. Harris opened the case to the Court on behalf of the plaintiff.)

(Mr. Toulouse reserved the defendants' opening statement.)

The Court: Call the plaintiff's first witness or otherwise proceed with the plaintiff's case in chief.

Mr. Harris: Yes, your Honor. This witness will be called somewhat out of order but he has requested permission to leave early, so I am doing that.

The Court: Is there any objection?

Mr. Toulouse: No.

For the purposes of the record, your Honor, I want to move at this time that as to the defendants Stepich and Hopkins in particular, and as to all of the defendants, that the indictment be dismissed, as to the defendants Stepich and Hopkins in particular, on the opening statement of counsel to the effect that the only thing alleged in the indictment or in counsel's opening statement is the bare fact that these two men held themselves out to be officers of a corporation which apparently is alleged in the indictment to have equipped and occupied some premises in a building at 9616 17th Avenue S.W. The mere fact that they may have agreed to do it does not in any way constitute a conspiracy or even evidence of a conspiracy to violate any law of [10] the United States.

I might say that if that were true, an agreement made in this court room to form a club to form a bar to sell whiskey in the Olympic Hotel would

ipso facto in the mere fact that you had made such an agreement constitute a crime without the further agreement or without some evidence that counsel has not mentioned, that they further intended to operate this club and not pay this \$37.50 occupation tax due the Government for the year in question.

For the reason just stated, I move that particularly as to those two defendants whom counsel's opening statement merely mentions as officers of a corporation, who equipped a place of business for the corporation apparently—he does not say that they did it for themselves—and held themselves out to be officers of this corporation and equipped this place of business—for a dismissal of the indictment as to those two defendants, and as to all of the defendants.

The Court: The motion is denied as to each and all of the defendants.

Proceed.

Mr. Harris: I will call Mr. Riddell. [11]

NORMAN R. RIDDELL

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harris:

Q. Would you state your name, please?

A. Norman R. Riddell.

Q. What is your occupation?

(Testimony of Norman R. Riddell.)

A. I am County Clerk of King County.

Q. And your address?

A. 901 County-City Building.

Q. Did you receive a subpoena duces tecum to appear and bring with you a certain file?

A. I did.

Q. Have you complied with that subpoena, sir?

A. I have.

Q. And what file do you have with you at the present time?

A. Our official Superior Court File No 441309, "State ex rel. Charles O. Carroll, Prosecuting Attorney of King County, Relator, vs. White Center Athletic Club, a corporation, and Brooks Realty Company, Inc., [12] a corporation, Defendants."

Mr. Harris: Now, may I confer with counsel?

The Court: You may.

(Mr. Harris confers with Mr. Toulouse and Mr. Spiller.)

The Court: Will counsel arrange to use only copies certified or not certified, according to their agreement, and do not ask to use the original records for keeping by this Court?

Mr. Harris: For the record then, your Honor, in the original file is the Answer in 441309, of which I have in my possession a certified copy, and I am submitting the certified copy to your Honor with the original, and that being the only——

The Court: Let the certified copy be marked as Plaintiff's Exhibit 1.

(Testimony of Norman R. Riddell.)

Mr. Harris: All right.

The Court: Let the certified copy, not the original file, be marked Plaintiff's Exhibit 1 for identification.

(Photostat "Answer" marked Plaintiff's Exhibit 1 for identification.) [13]

Q. (By Mr. Harris): Mr. Riddell, will you state, if you know, whether or not the file that you have in your possession, the original of it, is an official record of your office?

A. Yes. That is one of my deputies' signatures, and the photostatic copy is a certified picture of the original record.

Q. And that original record has been under your control and custody in your regular operation of your business, is that right?

A. Yes, sir.

Mr. Harris: At this time, your Honor, the Government will offer Plaintiff's Exhibit 1 but only as to page 2, commencing with the words "State of Washington County of King," which is found on the last part of the Plaintiff's Exhibit 1.

The Court: Plaintiff's Exhibit 1, as to the part specified in the offer of counsel for the plaintiff, is now offered in evidence?

Mr. Harris: Yes.

Mr. Toulouse: I object to the introduction of Plaintiff's Exhibit 1 on the grounds it is not relevant or material to any issue framed by the indictment, and it is not relevant as to any issue

(Testimony of Norman R. Riddell.)

outside of the issue probably framed in the entire file that Mr. Riddell has before him, and that if it be introduced [14] that the entire file covering the subject matter that it is relevant with respect to be introduced.

The Court: The objection is overruled. Plaintiff's Exhibit 1 is now admitted.

(Plaintiff's Exhibit 1 received in evidence.)

The Court: Any other questions of this witness?

Mr. Harris: No, your Honor.

Mr. Spiller: We have none.

Mr. Toulouse: No questions.

The Court: Is there any objection to Mr. Riddell taking with him the original files and records in his office as Clerk of the County of King in Cause No. 441309?

Mr. Spiller: No objection.

Mr. Toulouse: None.

Mr. Harris: No, your Honor.

The Court: You may take the original file back with you and thank you for your trouble, Mr. Riddell.

(Witness excused.)

The Court: You may call the next witness.

Mr. Harris: Mr. Montante. [15]

CHARLES P. MONTANTE

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harris:

Q. Would you state your full name and spell it, please?

A. Charles P. Montante, M-o-n-t-a-n-t-e.

Q. What is your address?

A. 2312 State Street, Olympia, Washington.

The Court: How long have you lived there, Mr. Montante?

The Witness: Nine years, sir.

The Court: Before that, where was your home?

The Witness: New York City, sir.

The Court: You may inquire.

Q. (By Mr. Harris): Mr. Montante, what is your occupation?

A. I am a field agent for the Washington State Tax Commission.

Q. And, briefly, what do your duties consist of?

A. My duties consist of issuing tags for all mechanical devices throughout the State and also checking [16] to see that these devices are properly registered with the State.

Q. Now, did you receive a subpoena to appear in this case and a subpoena duces tecum to bring with you certain records? A. Yes, sir.

Q. And have you complied with that subpoena and do you have those records with you?

(Testimony of Charles P. Montante.)

A. Yes, sir.

Q. What are those records?

A. The records are the excise tax return reports which the White Center Athletic Club, Inc., files every two months.

Q. And what period of time in particular do those cover relevant to this case between July, 1951, and May, 1952?

A. Well, they started business 7-1-51, and they discontinued business some time in August of '52.

The Court: And those records are whose records?

The Witness: The returns that are received by the State of Washington Tax Commission.

Q. (By Mr. Harris): And are they part of the official records of the State? [17] A. Yes.

Q. And kept in the regular course of business there? A. Yes, sir.

Q. And you have brought them here from Olympia, have you? A. Yes, sir.

Mr. Harris: Now, may those be marked, your Honor? I don't want to mark them all.

The Court: Will the witness step down and in the presence of counsel on both sides identify silently to them what it is counsel wishes to have identified.

(Witness conferred with counsel on both sides.)

The Court: The witness may resume the witness stand.

(Witness returns to stand.)

(Testimony of Charles P. Montante.)

Q. (By Mr. Harris): Mr. Montante, you have no objection, do you, to removing certain papers that have been filed as the original file in this case, is that correct? A. That is correct.

Q. Are you able to pull out those papers now?

A. Yes, sir.

Mr. Harris: I think if we take out each page then, you Honor, and mark it it will probably be of [18] a little more assistance to both sides.

The Court: Is that the way it is preferred by both sides?

Mr. Toulouse: Yes.

The Court: What is it you wish him to withdraw first?

Q. (By Mr. Harris): Mr. Montante, will you please remove then the first one that you have there and hand it to the bailiff, please?

(Removes document and hands it to the bailiff.)

The Witness: Are these supposed to stay here in the Court?

The Court: The answer is yes.

Mr. Harris: The ones that you have removed unless counsel desire the others, yes.

Now, may those be marked, your Honor?

The Court: It will be marked Plaintiff's Exhibit 2 for identification.

(Tax Commission records marked Plaintiff's Exhibit 2 for identification.)

(Testimony of Charles P. Montante.)

The Court: Show Plaintiff's Exhibit 2 for [19] identification to counsel on both sides.

(Plaintiff's Exhibit 2 for identification handed to counsel.)

The Court: I am not sure that we can take time to read every line and study it carefully. I wish counsel at the place where you are would call attention to the pertinent part that you intend to deal with and let opposing counsel see that so as to accommodate opposing counsel.

Mr. Harris: Yes, your Honor. It is the intention of the Government only to offer the reference on each of the papers that constitute Plaintiff's Exhibit 2 to the White Center Athletic Club, Inc., the address where the operation is, the date, the signature of the officer and his position. The other details the Government is not offering.

The Court: Any objection?

Mr. Toulouse: Your Honor, I would like to ask the witness a few questions on voir dire before I make an objection.

The Court: I think if counsel do not stipulate at the beginning that these are State records, official State records, that you ought to on behalf of the plaintiff establish admissibility.

Mr. Harris: Yes, your Honor. [20]

Q. (By Mr. Harris): Mr. Montante, are these records kept by your department? A. Yes.

Q. Are they the official records of your department? A. Yes, sir.

Q. Kept in the ordinary course of business?

(Testimony of Charles P. Montante.)

A. Yes, sir.

Q. And have been in the custody and control of your department ever since? A. Yes, sir.

Q. And you brought them here to court without any other markings having been put on them, is that right? A. That is right.

Q. And they are the official records of the State of Washington? A. That is correct.

The Court: Does that meet—

Mr. Toulouse: No. That still didn't meet my objection, your Honor.

The Court: Well, if it is strictly on voir dire, not by way of general cross-examination, you may inquire only as to the admissibility of these documents.

Mr. Toulouse: Mr. Montante, looking at [21] Plaintiff's Exhibit 2, have you been the custodian of each one of those papers going to make up Plaintiff's Exhibit 2 since on or about the date that they bear as to their receipt? Have you been the custodian of those records yourself?

The Witness: Just part of these records.

Mr. Toulouse: In other words, as far as Plaintiff's Exhibit 2 is concerned, you don't know whether or not those are the records of the department?

The Witness: Well, the excise tax return forms are kept in a separate file, and the slot machine returns are kept in my office. In other words, I have nothing to do with the excise tax return forms.

Mr. Toulouse: In other words, you had nothing to do with those returns right there as far as

(Testimony of Charles P. Montante.)

physical custody of those papers is concerned? You haven't had any custody from the time they were received?

The Witness: That is right.

Mr. Toulouse: And you don't know whether or not those papers referred to are the official papers of the White Center Athletic Club, do you?

The Witness: These are the official papers of the White Center Athletic Club.

Mr. Toulouse: Were those papers signed in front of you by any member of the corporation? [22]

The Witness: No, sir.

Mr. Toulouse: You don't know whose signature is on there, do you?

The Witness: No.

Mr. Toulouse: And you don't know whether or when those papers were received by the State of Washington or by whom they were received, do you?

The Witness: That is correct.

Mr. Toulouse: I object to the introduction on the ground that there is no foundation to show that these are the records of the State of Washington or that this man has had custody of these records since the period of time involved, that is since some time in 1951 and some time in 1952 or that they are in fact the reports of the White Center Athletic Club, or for that matter, that they are relevant or material to any issue framed by this indictment.

The Court: You may inquire or otherwise proceed.

Q. (By Mr. Harris): Are these the official rec-

(Testimony of Charles P. Montante.)

ords of the Tax Commission of the State of Washington located at Olympia, Washington?

A. Yes, sir.

Q. And you know that of your own knowledge, do you? [23]

A. Yes, sir.

Q. And you were authorized to bring them here and did bring them here?

A. That is correct.

Mr. Harris: I will renew my offer.

The Court: It is necessary that somebody validate them as pertaining to something or somebody.

Q. (By Mr. Harris): And to whom do they pertain?

A. They pertain to the White Center Athletic Club, Incorporated.

Q. Located where?

A. At 9616 17th S.W., Seattle, Washington.

Q. And signed by whom?

A. Signed by John F. Stepich, President.

Q. President of what?

A. Of the White Center Athletic Club, Incorporated.

Q. All right. Refer to the second page then. To what does that apply?

A. The second page is the excise tax return for the period of July and August, 1951, on which they reported their income on the retailing service and other activities, and is signed by Peter Desimone, manager.

Q. And when you say "they," you are referring to what establishment, if any? [24]

A. White Center Athletic Club, Inc.

(Testimony of Charles P. Montante.)

Q. Located at the same address you previously stated? A. That is right.

Q. Now, would you look at each instrument that appears after the second page and see if your answers would be in any variance from the ones you have already given?

The Court: I want him to name the name of the parties. He has mentioned two parties and that bears on the question of materiality or relevancy, and I wish you to adduce the same information from each part of it.

Mr. Harris: All right.

Q. (By Mr. Harris): Now, on the third page, to what establishment, if any, does that apply?

A. To the White Center Athletic Club, Incorporated, and that is the excise tax return for the period of September and October, 1951.

Q. Signed by whom?

A. Signed by Harold Hopkins, Secretary of the White Center Athletic Club, Inc.

Q. And the fourth page?

A. It is the November—December excise tax return, [25] White Center Athletic Club, Incorporated, 9616 - 17th S.W., Seattle, Washington, and this return is also signed by Harold Y. Hopkins, Secretary.

Q. All right. The fifth page.

A. This excise tax return is for January and February, 1952. It is for the White Center Athletic Club, Inc., at 9616 17th S.W., Seattle, Washington, and it is also signed by Harold Hopkins.

(Testimony of Charles P. Montante.)

Q. The sixth page, if there is one.

A. That is all.

The Court: Miss Reporter, could you handily turn to the statement of counsel whereby he limited the offer as to materiality?

Mr. Harris: Well, to save time, the Government offers only as to Plaintiff's Exhibit 2 the title of the form, the White Center Athletic Club, or the establishment that filed it, its address, the date, and the signature of the purported officer and his position.

The Court: The objections are overruled. Plaintiff's Exhibit 2 is now admitted for the limited purpose stated by counsel.

(Plaintiff's Exhibit 2 received in evidence.)

Mr. Harris: Your witness.

Cross-Examination

By Mr. Toulouse:

Q. Mr. Montante, Plaintiff's Exhibit 2 is the retail sales tax return of the State of Washington, is that right? A. That is right, sir.

Q. Now, examining that exhibit, is there anything in that exhibit that indicates that the White Center Athletic Club in any way paid a retail sales tax upon the sale of liquor or whiskey?

A. No, sir.

Q. You don't know whether or not that is the signature of John Stepich on that application, do you? A. That is correct.

(Testimony of Charles P. Montante.)

Q. You do not know whether it is his signature?

A. I do not.

Q. And you don't know whether that is the return of the White Center Athletic Club, Inc., that is in this case, do you? As far as you know, it could be some other corporation?

A. I don't know——

Mr. Harris: Just a moment. May the witness have [27] an opportunity to explain his answer?

The Court: Pause after each question to give the witness a chance to answer.

A. Each account has a separate file number on which they report, and the file number given to the White Center Athletic Club is on its excise tax return, which is credited to his account in the amount of money that he pays to the State.

Q. (By Mr. Toulouse): In other words, what you are saying is that the State gives each account a number, and any papers that are mailed into the State go in that number? A. Yes, sir.

Q. And you just assume that those papers are mailed in by the persons authorized to have that number, is that correct? A. That is right.

Q. So my statement is still correct, that you don't know whether or not that is Mr. Stepich's signature or whether or not that is Mr. Hopkins' signature, is that correct? A. That is correct.

Q. You don't know whether or not that is a genuine report, do you? You merely know that it purports to be?

A. Will you repeat that again, sir? [28]

(Testimony of Charles P. Montante.)

Q. You don't know whether or not that is a genuine report of an officer of the White Center Athletic Club, do you? A. No. I do not know.

The Court: Any other questions?

Mr. Harris: No, your Honor.

The Court: The Court will be at recess for about ten minutes.

Mr. Toulouse: I have one more question of this witness.

The Court: You may ask that now, and the statement of the Court will be stricken.

Q. (By Mr. Toulouse): Page one of Plaintiff's Exhibit 2, what is that?

A. That is an application for a certificate of registration.

Mr. Toulouse: That is all.

Redirect Examination

By Mr. Harris:

Q. There was one issued? Was that certificate issued?

A. Yes, sir. The certificate was issued [29] sometime in November of '51.

Mr. Harris: Thank you. That is all.

The Court: Did that, as a part of the record in connection with such issuance, play any part?

The Witness: No, sir.

The Court: What was it there for? What did you accumulate it for if it played no part?

The Witness: I was talking about the certificate that was issued, is that correct, sir?

(Testimony of Charles P. Montante.)

The Court: No. I want to know whether or not the State of Washington made, or is supposed to have ever made, any use of those exhibits or parts of those exhibits which are now in evidence for limited purposes as Plaintiff's Exhibit 2. What use did the State make of those records, if you know?

The Witness: Well, this is the account's records, sir, as to when he starts business and as to the——

The Court: It had nothing to do with the thing about which Mr. Harris just now asked you, is that right or wrong? Read Mr. Harris' question. Never mind. We shall take a ten-minute recess.

(Recess.)

The Court: May the record show that all parties on trial with their counsel are present?

Mr. Harris: Yes, your Honor. [30]

Mr. Toulouse: Yes, your Honor.

Mr. Spiller: Yes, your Honor.

The Court: You may proceed with the interrogation of this witness.

Recross-Examination

By Mr. Toulouse:

Q. Mr. Montante, Plaintiff's Exhibit 2 is a sales tax return, is a series of sales tax returns, is that correct? A. That is right.

Q. And the only use that the State of Washington makes of those sales tax returns is to see whether or not the sales tax due the State of Washington is paid, is that correct?

(Testimony of Charles P. Montante.)

A. That is correct.

Q. And the returns in no way specify what merchandise was or was not sold. They merely specify the amount of merchandise sold and the tax paid thereon?

A. That is correct.

Q. And the State of Washington has never made any use of those returns since they were made and since they were paid?

A. That is correct. [31]

Mr. Toulouse: That is all.

Mr. Harris: No other questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Harris: May this witness be excused?

The Court: Any objection?

Mr. Toulouse: No objection.

The Court: This witness is excused and may now retire from further attendance at this trial.

Call the next witness or otherwise proceed.

Mr. Harris: I would like to call Mrs. Johnsen a little out of order because of her health.

GERALDINE JOHNSEN

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harris:

Q. Would you state your name, please?

A. Geraldine Johnsen. [32]

(Testimony of Geraldine Johnsen.)

Q. How do you spell "Johnsen"?

A. J-o-h-n-s-e-n.

Q. And what is your address, Mrs. Johnsen?

A. 10644 Marine View Drive.

Q. And generally what part of the city is that located in? A. West Seattle.

Q. Do you know where the White Center Athletic Club is? A. Yes.

Q. How far is that from there?

A. Oh, approximately a mile.

Q. Have you ever been to the White Center Athletic Club? A. Yes.

Q. And do you know the address there?

A. No, I don't.

Q. Do you know the proximate location, though, in White Center? A. Yes.

Q. Where is it?

A. Well, it is a block off the main road in White Center and just off Roxbury.

Q. And just generally what type of a building structure is it, if you know? [33]

A. It seems to me it is on the order of a quonset hut.

Q. All right. Now, have you ever been there?

A. Yes.

Q. And have you seen any of the defendants there at any time? A. No.

Q. Do you recall the occasion that you were there? A. Yes.

Q. And what day was that, if you know?

(Testimony of Geraldine Johnsen.)

A. It was the 29th of February I believe, a Friday or a Saturday night, I am not sure.

Q. Of 1952? A. Yes.

Q. And what, if anything, was taking place there at that time?

A. Well, our Orthopedic Guild was giving a dinner party.

Q. And what was the name of your Orthopedic Guild?

A. The Dr. Edward Lincoln Smith Guild.

Q. And were the members of your Guild there at that time? A. Yes.

Q. How many, do you know?

A. I have forgotten. [34]

Q. Well, approximately?

A. How many members? Just the members or members with their parties?

Q. No. How many were there as the Guild or as guests of the Guild, altogether?

A. Well, let's see. I really can't remember.

Q. Were there ten or more?

A. Oh, no. It was 90 or more, I would say.

Q. And what did you do there that evening, if anything?

A. We had dinner and we danced and we had drinks.

Q. Now, what kind of drinks did you have?

A. Regular drinks with liquor, hard alcohol.

Q. And how would you obtain those drinks?

A. We just ordered them either at the bar or at the tables where we were sitting.

(Testimony of Geraldine Johnsen.)

Q. And the alcohol that was used, did you bring your alcohol? A. No.

Q. Did any members of your Guild that you know of bring any liquor with them? A. No.

Q. And what, if anything, did you pay for the liquor?

A. Well, we paid just per drink. I believe [35] it was around sixty cents a drink. I didn't pay for them. I don't know.

Q. Who paid for you? A. My husband.

Q. Was there anything that occurred that evening relative to some question concerning the liquor?

A. The only thing I know of is that Mrs. Noble was given a list and she gave it to my husband who, in turn, gave it to me, a list of liquor, and I just kept it. I didn't know what it was for or what I was to do with it.

Q. What was on that list?

A. Well, it had a list of different kinds of liquor, how many bottles.

Q. Have you any idea of how many bottles of liquor or of the type of liquor that was on the list?

A. I really didn't pay too awfully much attention because I didn't know what it was for.

Q. Did you read the list, however?

A. Yes. I glanced at it.

Q. And you have no independent recollection now? A. No.

Q. If you were able to see that list or a copy of that list, would that assist you in any way?

(Testimony of Geraldine Johnsen.)

A. Well, I would recognize the list because [36]
I initiated it.

Mr. Harris: May this be marked?

The Court: It may be marked.

(Photostat marked Plaintiff's Exhibit 3 for
identification.)

Q. (By Mr. Harris): Mrs. Johnsen, you are
being handed Plaintiff's Exhibit 3 for identification.
Does that assist you in any way in refreshing your
recollection of that list?

A. Yes, this is the list.

Q. How are you able to identify it?

A. Mainly by my initials on it.

Q. Do they appear there? A. Yes.

Q. What are your initials? A. GMJ.

Q. Now, I will ask you, after having refreshed
your recollection from the list, what were the
amounts and what was the type of liquor that was
on that list?

The Court: May I ask you first to note that you
are leaving the witness with the statement that this
is it. Now, you wish——

Mr. Harris: Excuse me, your Honor. [37]

Q. (By Mr. Harris): Mrs. Johnsen, is that the
exact statement or a photostatic copy of the state-
ment? A. This is a photostatic copy.

Q. Does that assist you in refreshing your recol-
lection? A. Yes.

Q. Can you state now what the types of liquor
and the amounts were that were on that list?

(Testimony of Geraldine Johnsen.)

A. By reading it off the list, yes.

Q. And other than that, though, you are not able to refresh your recollection?

A. No, I am not.

Mr. Harris: That is all.

Mr. Toulouse: No questions.

Mr. Spiller: No questions.

The Court: You may step down.

Mr. Harris: I have one more question.

The Court: You may be seated again.

Q. (By Mr. Harris): You received that list as I understood you, or the original of that list, from Mrs. Noble, am I correct?

A. Mrs. Noble gave it to my husband, who in turn gave it to me.

Mr. Harris: All right. May Mrs. Johnsen be excused, your Honor? [38]

The Court: Is there any objection?

Mr. Toulouse: No objection.

Mr. Spiller: No objection.

The Court: She may now be excused and may retire when she wishes to.

(Witness excused.)

Mr. Harris: I would like to call Mr. Burdick.

DONALD R. BURDICK

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harris:

Q. Would you state your name, please?

A. Donald R. Burdick.

Q. How do you spell your last name?

A. B-u-r-d-i-c-k.

Q. And what is your address, Mr. Burdick?

A. 501 Washington Building, Tacoma.

Q. And your occupation?

A. I am chief of the Returns Processing Branch for the Internal Revenue Service. [39]

Q. Connected with what official Government agency, if any?

A. The Treasury Department.

Q. Of the Federal or the State Government?

A. United States Government.

Q. And how long have you been in that position?

A. Been there about a year and a half, sir.

Q. Do you have custody of the records of the Internal Revenue Department?

A. Of the returns, yes, sir.

Q. And you brought them with you today, have you?

A. I have brought certain records, yes, sir.

Q. And to whom do those records apply?

A. To the White Center Athletic Club, Incorporated.

(Testimony of Donald R. Burdick.)

Q. Would you mind handing those to the bailiff so they may be brought down here and counsel can see them?

(Witness' records are handed to Mr. Harris.)

Mr. Harris: I ask that this be marked separately by itself.

The Court: It may be marked.

(Quarterly Tax Returns marked Plaintiff's Exhibit 4 for identification.)

Mr. Spiller: May I ask of the Court for [40] our purposes that that exhibit be shown to one of the defendants here?

The Court: Is there any objection?

Mr. Harris: No, your Honor.

The Court: The bailiff may let counsel see Plaintiff's Exhibit 4 for identification for the purpose mentioned by counsel a moment ago.

(Plaintiff's Exhibit 4 for identification handed to Mr. Spiller.)

Mr. Harris: Then the other instruments all together may be marked as Plaintiff's Exhibit 5, or may they be?

The Court: They may be.

(Federal Tax Records marked Plaintiff's Exhibit 5 for identification.)

Mr. Harris: Now, may Plaintiff's Exhibit 4 be shown to the witness?

The Court: It will now be done.

(Testimony of Donald R. Burdick.)

Q. (By Mr. Harris): Mr. Burdick, will you state, please, what Plaintiff's Exhibit 4 is, if you know?

A. The top document is a reconciliation statement form W-3 for the year 1951. The second page is Form 941, [41] the employer's quarterly tax return for the quarter ended September 30, 1951. The next document is an explanation of delinquency.

Q. And the next?

A. The last document is the employer's quarterly tax return for the quarter ended December 31, 1951.

Q. And what establishment, if any, does it refer to?

A. The White Center Athletic Club, Inc.

Q. Located where?

A. 9616 - 17th S.W., Seattle.

Q. And would you now go through the documents again that compose Plaintiff's Exhibit 4 and state if any contain the signatures of any of the defendants on trial here?

A. The employer's quarterly tax return for the quarter ended September 30, 1951, is signed by——

The Court: Just a moment. It is not in evidence yet. He should answer yes or no to your question.

Q. (By Mr. Harris): Is it signed by any of the defendants on trial here?

Mr. Spiller: May I interrupt, if the Court please, on that? I object to the question or at least unless he knows of his own knowledge that the individual defendant signed that. [42]

The Court: The objection is overruled. If he knows, is in the question, as I understand it.

(Testimony of Donald R. Burdick.)

The Witness: Will you repeat the question?

Q. (By Mr. Harris): Do any of the component parts of Plaintiff's Exhibit 4 bear the signature of any of the defendants who are on trial here?

The Court: If you know.

A. Yes, sir.

Q. And are these the official records of your bureau? A. They are, sir.

Q. And they have been brought here to Court by you? A. That is right.

Q. And are they kept in the ordinary course of business by the Internal Revenue Bureau?

A. Yes, sir.

Q. And they constitute part of the official records? A. That is right.

Q. Which, if any, of the defendants' names appear on any of the component parts of Plaintiff's Exhibit 4?

The Court: Do you have any objection?

Mr. Spiller: No objection to the name appearing.

The Court: Very well. You may answer. [43]

A. On the quarterly tax return for the quarter ended September 30, 1951, it is signed by John F. Stepich. The explanation of delinquency is also signed by John F. Stepich. The employer's quarterly tax return for the quarter ended December 31, 1951, is signed by Harold Hopkins.

Mr. Harris: I will offer Plaintiff's Exhibit 4.

The Court: It is admitted.

(Plaintiff's Exhibit 4 received in evidence.)

(Testimony of Donald R. Burdick.)

Mr. Harris: May the witness be shown Plaintiff's Exhibit 5?

The Court: It will now be done.

(Plaintiff's Exhibit 5 for identification handed to the witness.)

Q. (By Mr. Harris): Mr. Burdick, you are being handed Plaintiff's Exhibit 5 for identification; will you state, if you know, how many component parts constitute that exhibit?

A. There are three parts, sir.

Q. And are they kept in the official course of your business? A. They are, sir.

Q. And they are part of the official records [44] of the Internal Revenue Department?

A. They are, sir.

Q. And you brought them here to Court from those records? A. I have, sir.

Q. Taking the first component part, are you able to state to what does it apply?

A. The first page is a Form 11-B special tax return for the White Center Athletic Club, Inc., for a coin-operated gaming device stamp for the period July 1, 1951, to June 30, 1952.

Q. The second component part?

A. The second part is a transcript of the account on one of our Internal Revenue forms.

The third document is a Form 11-B special tax return for the White Center Athletic Club, Incorporated, for a stamp for a coin-operated amusement device for the period July 1, 1951, to June 30, 1952.

(Testimony of Donald R. Burdick.)

Q. And do you know if the signature of any one of the defendants appears thereon?

A. It does, sir.

Q. On which component part, if any?

A. On the first and the third pages, sir.

Q. And whom, if you know?

A. Peter Desimone. [45]

Mr. Harris: I will offer Plaintiff's Exhibit 5, your Honor.

Mr. Toulouse: No objection.

Mr. Spiller: No objection.

The Court: Plaintiff's Exhibit 5 is now admitted.

(Plaintiff's Exhibit 5 received in evidence.)

Q. (By Mr. Harris): Mr. Burdick, have you made a check of the official records to determine whether or not the White Center Athletic Club, Inc., had a Federal retail liquor stamp during the period July 1, 1951, to May 8, 1952?

A. We have, sir.

Q. And have you discovered any?

A. We have found none, sir.

Q. Any wholesale liquor dealer's stamp?

A. No, sir.

Q. Have you made a search of the records to determine whether or not any one of the defendants, which includes Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert De Pierris, have held such a stamp?

A. We have made a search and could find none, sir. [46]

(Testimony of Donald R. Burdick.)

Q. During that period?

A. During that period.

Q. Mr. Burdick, has the institution, the White Center Athletic Club, Incorporated, or any of the defendants, persons that I named, paid any of the special tax required by law to operate as a retail liquor dealer for that period of time?

A. As far as I know, they have not, sir.

Q. And you have searched the records, have you?

A. We have.

Q. And have found none?

A. We have found none.

Q. They have made no application or paid any tax or have any stamps at all?

A. According to our records, there is no record of it.

Mr. Harris: Your witness.

Cross-Examination

By Mr. Spiller:

Q. Mr. Burdick, will you turn to Plaintiff's Exhibit 4, please? The first component part of Exhibit 4 bears a signature which you have testified to, and whose signature does that purport to be? [47]

A. Not the first component part.

Q. The second one?

A. The second one does, sir.

Q. That bears a signature? A. It does.

Q. And whose is it? A. John F. Stepich.

Q. Were you present when that was signed?

A. I was not.

(Testimony of Donald R. Burdick.)

Q. You have testified on direct that you know that to be Mr. Stepich's signature?

A. I did not testify to that, sir.

Mr. Spiller: I don't want to be argumentative about this, if the Court please, but I do want to be certain for the record that Mr. Burdick's testimony is correctly in the record.

Q. (By Mr. Spiller): I understood you to be asked whether you knew whose signatures were on those component parts of Exhibit 4, and your answer was that you did. Now, do you know that to be John Stepich's signature? A. I do not, sir.

Q. You do not?

A. I do not know that to be his actual signature.

Q. And as to the other signatures on the [48] several remaining component parts of Plaintiff's Exhibit 4, do you know those to be the signatures of the parties whose names are there written?

A. I do not, sir.

Q. And is the same thing true with respect to the purported signatures of persons appearing in Plaintiff's Exhibit 5? A. I do not, sir.

Q. What? A. I do not, sir.

Mr. Spiller: I think that is all.

Mr. Harris: That is all, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Harris: I will call Mr. West.

BERCH D. WEST

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harris: [49]

Q. Will you state your name, please?

A. Berch D. West.

Q. And your address, Mr. West?

A. Yakima, Washington.

Q. Do you have an address over there?

A. 808 N. 24th Avenue.

Q. And your occupation?

A. Investigator for the Washington State Liquor Control Board.

Q. How long have you been so employed?

A. About five years.

Q. And were you employed then during the period July 1, 1951, through May 8, 1952?

A. Yes.

Q. In that same capacity? A. Yes.

Q. Where were you stationed during that period of time or a portion of that time?

A. Well, I work, of course, all over the State, but I did a lot around Seattle around about that time.

Q. Have you ever been to the White Center Athletic Club? A. Yes, I have.

Q. And where is that located?

A. That is located at 9616-17th Avenue [50] S.W., Seattle.

(Testimony of Berch D. West.)

Q. When were you out there, if you were, during that period of time?

A. Well, the first time I was there was October 20, 1951.

Q. And what time of the day was it that you went there?

A. It was real early in the morning of the 20th. It was around 12:15, about that time, that I went there. It was shortly after midnight.

Q. When you arrived there, what, if anything, occurred?

A. Well, of course, when I arrived there, there was a doorman there, and being required, I suppose, to have a membership, I was questioned considerable in regard to whether I was a member or not, of which I wasn't. After some conversation there, he wanted to know how I knew about the place.

Mr. Toulouse: Now, I object.

Mr. Harris: I will try to straighten that out.

Q. (By Mr. Harris): That conversation that you had there, was that with any of the defendants at that time? A. No. It wasn't.

Q. Did you have a conversation with any of the [51] defendants immediately after that?

A. Yes, I did.

Q. Which defendant was that?

A. Mr. Desimone.

Q. And what were the circumstances leading up to the conversation with him?

A. Well, he entered the place, the office where the doorman was. This doorman was just about to

(Testimony of Berch D. West.)

refuse me service, and Mr. Desimone came in there and the doorman told him, Mr. Desimone, that I had been there before, which I had told the man, with some friends or something on that order, and I wanted to come in, so Mr. Desimone questioned me about the same line as to where and when and how I got in.

Q. What did he say?

A. Well, he asked me about the same things that the doorman did as to who I came with, and I told him some people that I don't recall, who I told him, now. So after the conversation, he told me to go on in.

Q. And he admitted you, did he, at that time?

A. Yes, he did.

Q. And how long did this conversation take place before he admitted you?

A. Oh, it didn't last too long; probably a minute or so. It pretty well covered what the doorman [52] said, what he asked me.

Q. All right. What did you do, if anything, after you entered the premises, or just how did you gain entrance? Let us go through that first.

A. You mean from the starting in the front before I entered the place?

Q. Yes.

A. Well, there is a canopy over there. It is a quonset-type building, quite large. I would say probably it is maybe 50-foot wide, and probably around—at least 100 foot, I would say, long. Well, after you open the first door and then contact the

(Testimony of Berch D. West.)

doorman, and after I was admitted, told to go in, there is a check room right on your left out there where the doorman is, and where you check your coat. It would be on your left as you enter. Then I understand there is another room or something back there, but I wouldn't know about that. I was just told that. On the right as you enter here, there is—I don't know what you call it—kind of another little room off on your right there.

Well, after I was admitted, they pushed on this button here, and it is electrically operated and the door was opened and I went straight—it is over to your right and straight ahead to the bar, and sat down.

Q. What kind of a bar? [53]

A. Well, a square more or less, a square bar. In the center it has a pyramid of glasses and bottles of different types and things that come up in a pyramid in the center of the bar.

Q. Was there anything else in that room?

A. Yes. It it a very nice room as far as——

The Court: If you can, just answer the question.

Q. Describe what the inside of the room looked like. What were the other objects in the room?

A. Well, of course. I observed slot machines, one-armed bandits, plus a lot of liquor bottles setting there. Some had numbers on them; some did not have numbers on them. Shot glasses and glasses of different types, built up to a pyramid, and on top, as I recall, had two lights, kind of a soft, glowing, colored lights on the bottles.

(Testimony of Berch D. West.)

Q. Were there any tables in there?

A. Yes.

Q. How many tables approximately?

A. Well, I couldn't say right offhand. It looked like they were quite long from where I was sitting. There might have been fifteen, might have been twenty. I wouldn't know.

Q. Was there any dance floor area?

A. Yes, there was. [54]

Q. Now, what did you do after you got inside, if anything?

A. Well, I went directly to the bar and ordered drinks—of whisky.

Q. And who was at the bar, if any one?

A. Russell Felton at that particular time.

Q. And were there any other persons in the establishment?

A. Oh, yes. I don't recall just how many at that particular time. It probably built up into more later.

Q. Well, how many persons were in there, would you estimate?

A. Oh, maybe 35 or 50. I am just guessing at it.

Q. When you contacted Mr. Felton, where was he?

A. He was the bartender.

Q. Where was he located?

A. Just inside the bar.

Q. What, if anything, did you say to him at that time?

A. I didn't say anything in particular to him, just ordered drinks.

(Testimony of Berch D. West.)

Q. Did you order a drink from him?

A. Yes, I did.

Q. What did you say?

A. After being admitted, there was no question of asking him. [55]

Q. What did you say?

A. I just said: "I want a straight whisky with water."

Q. You said that to Mr. Felton? A. Yes.

Q. And what did he do?

A. He served it to me; poured it, straight whisky with water.

Q. Where did he get the whisky?

A. That whisky was poured out of a bottle back of the bar.

Q. Did you bring in any whisky there with you?

A. No, sir.

Q. Did you have any whisky in there that belonged to you? A. No, sir.

Q. And how do you know that it was whisky that he served you?

A. It looked like whisky, smelled like whisky, and tasted like whisky.

Q. What did you do after he served you that glass of whisky, if anything?

A. I paid him fifty cents for it.

Q. And did you order whisky from him again that evening? [56] A. Yes, I did.

Q. And was the same procedure followed?

A. The same procedure, yes, sir.

Q. And you paid for it? A. I paid for it.

(Testimony of Berch D. West.)

Q. Then did you leave?

A. After I had been there approximately around an hour or a little longer, I left.

Q. Did you go back there on another occasion?

A. Yes, I did.

Q. When was that, if you know?

A. That was about January 16th.

Q. And what, if anything, occurred there relative to your entrance at that time?

A. After I had been there the first time, there was nothing happened at the door. I wasn't questioned at all. I merely walked in with my companion.

The Court: Will you let the witness, by a proper question, give us information as to what year the January 16th date was?

The Witness: January 16, 1952.

Q. (By Mr. Harris): 1952, is that your testimony?

A. Yes, sir.

Q. And what occurred after you got in this time, if [57] anything?

A. I ordered drinks of whisky.

Q. From whom?

A. Another bartender by the name of Bert.

Q. Did you know his last name at that time?

A. No, sir, I did not.

Q. Do you know his last name now?

A. Yes, I do.

Q. What is his last name? A. DePierris.

Q. And is he here in the courtroom?

A. Yes, he is.

(Testimony of Berch D. West.)

Q. Do you see him? A. Yes, I do.

Q. You have mentioned three defendants, Felton, Desimone and DePierris. Do you see them all here in the courtroom? A. Yes, I do.

Q. And can you point them out? A. Yes.

Q. Would you do so?

A. Yes. Do you want me to point them out from here?

Mr. Harris: Can it be stipulated that he knows them? [58]

Mr. Toulouse: Point them out.

Mr. Harris: May he leave the stand and point out the three defendants?

The Court: He may do that.

(Witness leaves stand and points out Mr. Felton, Mr. Desimone and Mr. DePierris. Witness then returns to the stand.)

Q. (By Mr. Harris): And on January 16, 1952, how were you able to determine it was liquor that was served to you at that time?

A. Looked like whisky, smelled like whisky and tasted like whisky.

Q. Did you go back on another occasion?

A. Yes, I did.

Q. When was that?

A. I was there on January 30, 1952.

Q. How did you gain admittance at that time?

A. I had been there before and there was no questions asked. I just walked in.

Q. What did you do after you got inside?

(Testimony of Berch D. West.)

A. I sat at the bar, about the same location, and ordered drinks.

Q. And the same procedure followed?

A. Yes. [59]

Q. Did you have a conversation with Mr. De-Pierris? A. Oh, no particular conversation.

Mr. Spiller: I will object to that, if the Court please.

The Court: The objection is sustained. He didn't say anything, as far as I know, about whom he dealt with on that occasion.

Mr. Harris: I beg your pardon. I think that is correct.

Q. (By Mr. Harris): Did you see any of the defendants there at that time? A. Yes.

Q. Who? A. Mr. DePierris.

The Court: We will now take the noon recess in this case until two o'clock this afternoon. The Court is now at recess.

(At 12:00 o'clock p.m., Wednesday, April 21, 1954, proceedings recessed until 2:00 p.m., Wednesday, April 21, 1954.) [60]

April 21, 1954—2:00 P.M.

The Court: May the record show that all of the defendants on trial are present with their counsel and plaintiff's counsel is also present?

Mr. Harris: Yes, your Honor.

Mr. Toulouse: Yes, your Honor.

Mr. Spiller: Yes, your Honor.

(Testimony of Berch D. West.)

The Court: You may resume the interrogation of this witness now on the stand.

Q. (By Mr. Harris): Mr. West, I was asking you concerning January 30, 1952, prior to the noon recess. You stated you had seen Bert DePierris there on that evening. I ask you now what, if any, conversation did you have with him at that time?

A. On January 30th, there was no particular conversation that I recall.

The Court: That is sufficient. Ask him another question.

Q. Did you ask him what was his capacity, what was he doing there?

The Court: Answer yes or no. [61]

A. Yes.

Q. What was he doing there, if you know?

A. Bar tending, tending bar.

Q. Did you ask him for a drink on that night?

A. Yes.

Q. What were the words you used, if you recall?

A. I asked him for a drink of whisky straight with water.

Q. What did he do in response to that, if anything?

A. He got me a whisky straight with water.

Q. What did you do?

A. I proceeded to consume it.

Mr. Toulouse: Now, I object to counsel leading this witness. I have no objection——

Mr. Harris: I didn't——

Mr. Toulouse: Well, you have been.

(Testimony of Berch D. West.)

The Court: He hasn't led him yet.

Mr. Toulouse: I am cautioning him right now.

Q. (By Mr. Harris): What did you do, if anything, as far as he was concerned?

A. After the drink was served to me, I paid him for it.

Q. And how much did you pay him?

A. Fifty cents. [62]

The Court: And what person was that to whom you now refer?

The Witness: Bert DePierris.

Q. (By Mr. Harris): Did you bring any liquor with you on that evening? A. No, sir.

Q. Had you left any liquor there previously?

A. No, sir.

Q. And how were you able to determine that this was liquor on this occasion?

A. By the looks, the taste, and the smell.

Q. Did you go back to the White Center Athletic Club on another occasion after January 30, 1952?

A. Yes, I did.

Q. Did you go there on February 15, 1952?

Mr. Spiller: Object to that as a leading question.

The Court: Sustained.

Q. (By Mr. Harris): When was the next time you went back there? A. February 15, 1952.

Q. What time?

A. Shortly around midnight, shortly after.

Q. And how did you gain entrance on this occasion? [63]

(Testimony of Berch D. West.)

A. Just going in and they recognized me from previous visits.

Mr. Spiller: Object to that as not responsive to the question.

The Court: Read the question and the answer.

(Last question and answer read by reporter.)

The Court: The objection is overruled.

Q. (By Mr. Harris): Did you see any one of the defendants there on that evening?

A. Yes.

Q. Whom? A. Bert DePierris.

Q. And what was he doing on this particular evening, if anything?

A. He was tending bar.

Q. Did you have a conversation with him on that evening?

A. Yes, I did; just a small one.

Q. What was that conversation?

A. Just ordered a drink, whisky straight with water.

Q. And what did he do in response to your order?

A. He served me whisky straight with water.

Q. And what did you do, if anything, after receiving it? [64]

A. Paid him fifty cents a drink.

Q. How could you tell it was liquor?

A. Looked and tasted and smelled like whisky.

Q. Did you go back on another occasion after that? A. Yes, I did.

(Testimony of Berch D. West.)

Q. And when was the next time that you went back? A. I went back on March 9, 1952.

Q. Approximately what time, if you recall?

A. Midnight, shortly after.

Q. And how did you gain entrance on that occasion?

A. The same as before. I went to the door with a companion.

Q. The same way as the last time there?

A. Yes.

Q. And who, if any, of the defendants did you see there at that time?

A. Well, I seen Bert DePierris tending bar.

Q. Any one else?

A. Not right at that particular minute; just a few minutes later I did.

Q. Who did you see then?

A. Russell Felton.

Q. What, if anything, occurred when you first went in and saw DePierris. Did you have a conversation with him then? [65]

A. Well, just ordered a whisky straight with water.

Q. And what did he do in response to that?

A. Started to serve it to me.

Q. What happened then?

A. Mr. Felton came from somewhere and told him, hollered to him, and told him not to serve me any more drinks, that he thought I was a State man, and he did ask me to leave.

Q. Who asked you to leave?

(Testimony of Berch D. West.)

A. Mr. Felton.

Q. And was this conversation in the presence of Mr. DePierris?

A. That part, at that time it was.

Q. And what did you do then?

A. I told him okay; I would leave; but I asked to stop and get my coat on my way out.

Q. Did any one go with you to the door?

A. Mr. Felton, yes.

Q. And did you leave then? A. Yes, I did.

Q. Who went with you on that occasion, if you recall?

A. Another investigator, Roddy Whittall.

Mr. Harris: You may inquire. [66]

Mr. Spiller: No questions.

The Court: You may step down.

Mr. Toulouse: Just a minute. I have one question.

Cross-Examination

By Mr. Toulouse:

Q. Did this Rodney Twill accompany you on all these occasions? That is, January 16, January 30, February 15, and March 9?

A. Mr. Quill? No, sir.

Q. Is that the man you say accompanied you?

A. No, sir.

Mr. Harris: How do you spell it?

The Witness: I am not sure of that. W-h-i-t-a-l or double l, I wouldn't know.

Q. (By Mr. Toulouse): Is he still around?

(Testimony of Berch D. West.)

A. I don't know.

Mr. Harris: I might advise counsel he is under subpoena.

Mr. Toulouse: Is he in this courtroom now?

Mr. Harris: Mr. Whittall?

(No answer.) [67]

Q. (By Mr. Toulouse): What day of the week was January 16th?

A. Offhand, I wouldn't remember.

Q. 1952? A. I wouldn't remember.

Q. What day of the week was January 30, 1952?

A. I don't recall.

Q. How do you know that you were there on January 16, 1952?

A. Well, in the first place I was sent there by my office, Washington State Liquor Control Board, to make an investigation.

Q. How do you personally know that you were there on that particular occasion at that time? Do you have some memorandum in your pocket?

A. No, sir. Well, I went over and read the file at the liquor office.

Q. In other words, you have no independent recollection of having been there on January 16, 1952?

A. Other than just going over my files, that is right.

Q. Well, you either have an independent recollection or you don't have. Do you have an independent recollection of being there, independent of

(Testimony of Berch D. West.)

the file? A. Well, yes. [68]

Q. You have an independent recollection of being there? A. Yes, I have a recollection.

Q. What day of the week was January 30, 1952?

A. I don't recall whether it was Sunday or any other day of the week. I don't recall that.

Q. What day of the week was February 15, 1952? A. I don't recall.

Q. What day of the week was March 9, 1952?

A. I don't recall.

Q. Were you reimbursed by the State of Washington for the money that you purportedly spent at the White Center Athletic Club?

A. Yes. A certain amount of money is appropriated for that purpose and they reimbursed me later, the Liquor Board.

Q. Did you put in a voucher for the drink you purportedly bought on January 16, 1952?

A. Yes, I did.

Q. Were you reimbursed for that?

A. Yes.

Q. How many drinks were you reimbursed for?

A. For the 16th?

Q. Yes.

A. I believe I had purchased about eight [69] drinks altogether.

Q. That evening you purchased eight drinks?

A. Altogether, yes.

Q. And on January 30, 1952, how many drinks did you purchase?

(Testimony of Berch D. West.)

A. I don't recall. It could have been four to eight drinks. I just don't recall right offhand.

Q. One ounce glasses of whisky?

A. Presume so. I wouldn't know.

Q. On February 15, 1952, how much whisky did you purchase?

A. I think I purchased eight drinks.

Q. On March 9, 1952, how many drinks did you purchase? A. I didn't purchase any.

Q. On March 9th? A. No, sir.

Q. Where are these vouchers that you submitted to the State of Washington to be reimbursed?

A. I wouldn't know except they are probably in the possession of the Washington State Liquor Control Board.

Q. To whom in the Washington State Liquor Control Board do you give these vouchers?

A. To my superior.

Q. Who is he? [70]

A. At the present time, Mr. Seth Taylor, but he was not with the Board at that particular time.

Q. Well, who in the Washington State Liquor Control Board would have the vouchers that I have just referred to?

A. I wouldn't know, sir.

Q. Now, you say this looked like whisky. How does whisky look?

A. Well, just what we call bar whisky, it has a brown color, something like, similar, you might say, looked like coffee probably, not quite as dark, amber color. There are variations of color.

(Testimony of Berch D. West.)

Q. What brand did you purchase on January 15, 1952?

A. I couldn't tell you the exact brand.

Q. On January 30, 1952?

A. No, sir, I couldn't tell you.

Q. What brand of whisky did you purchase?

A. I couldn't tell.

Q. Was it a malt liquor?

A. I wouldn't know.

Q. On January 16, January 30, February 15, March 9, 1952, can you state whether or not any one of the drinks that you purchased was or was not a malt liquor?

A. I cannot.

Q. You say it tasted like whisky. How does [71] whisky taste?

A. Well, alcohol contents in it.

Mr. Spiller: I can't hear him, if the Court please.

The Witness: Alcohol contents.

The Court: Speak up.

Q. (By Mr. Toulouse): How does alcohol content taste?

A. Well, I really don't know how to explain it. I am not that familiar with whisky.

Q. After you had those eight drinks, did it feel like whisky?

A. I didn't drink eight drinks. I purchased eight drinks.

Q. What did you do with the drinks?

A. Oh, people along the bar, I bought them drinks.

Q. You bought people along the bar a drink?

(Testimony of Berch D. West.)

A. Yes.

Q. Well, if you didn't drink the whisky, how would you know that it looked like whisky and tasted like whisky? A. I drank some of it.

Q. You drank some of it?

A. I didn't drink eight drinks.

Q. You purchased that for other people at the bar? [72] A. Yes.

Mr. Toulouse: That is all.

Redirect Examination

By Mr. Harris:

Q. Mr. West, counsel asked you concerning the bottle that was used. Did you see this bartender on these occasions pour other drinks?

A. Yes, I did.

Q. What bottle did he use then?

A. There were many bottles, as I recall, a lot of Seagram bottles, a lot of bottles that had numbers on them; some of them didn't have any—I mean had great big numbers, another sticker put around with the numbers on it. Others didn't have numbers or names. There was some poured out of Seagram's bottle marked with Seagram labels. Some was otherwise.

Q. The drinks that he poured for you, were they all out of the same bottle?

A. I don't know. Some of them were, and probably the next time I went it was out of some other bottle.

(Testimony of Berch D. West.)

Mr. Toulouse: I ask that that be stricken. He said he didn't know.

The Court: That is stricken. The Court [73] will disregard it.

Mr. Harris: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Harris: Mr. Nicolai.

MAX R. NICOLAI

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harris:

Q. State and spell your name, please.

A. Max R. Nicolai—N-i-c-o-l-a-i.

Q. What is your address, Mr. Nicolai?

A. 2327 Harvard North.

Q. And your occupation?

A. I am an attorney at law.

Q. Do you know Harold Hopkins?

A. I have met Harold Hopkins.

Q. Do you see him here in the courtroom?

A. I am not sure. [74]

Mr. Harris: May Plaintiff's Exhibit 1 be shown to the witness?

(Plaintiff's Exhibit 1 handed to the witness.)

(Testimony of Max R. Nicolai.)

Q. (By Mr. Harris): Mr. Nicolai, you are being handed now Plaintiff's Exhibit 1. Would you refer to it, please, and state whether or not you have ever seen it before—or the original of it?

The Witness: May I take a minute to read this, your Honor?

The Court: Yes. You may do that.

(Witness examines Plaintiff's Exhibit 1.)

A. Yes, I have seen the original of this exhibit.

Q. Does your name appear thereon?

A. In two places on page two.

Q. And is that your signature?

A. That is a photostatic copy of my signature.

Q. And do you appear on there both in the capacity of attorney and as notary public, is that correct?

A. That is correct.

Q. And whose signature did you notarize?

A. The signature of Harold Y. Hopkins.

Q. And on what day did you notarize that signature?

A. According to the document, on the 29th day of March, 1952. [75]

Q. And did Harold Hopkins appear before you and sign that in your presence?

A. I don't have any independent recollection of it, but I assume he did.

Q. And you say you don't see the individual in this courtroom then who signed that in your presence?

A. I have a very poor memory as to persons

(Testimony of Max R. Nicolai.)

unless it be somebody I am extremely well acquainted with. I am not sure.

Q. Were you representing the White Center Athletic Club at this time? A. Certainly.

Q. And one of the officers came in and retained you, did he?

A. No. I don't think any of the officers of the club retained me. I think Mr. Desimone retained me.

Q. Did you ever talk to any of the officers of the club? A. Yes.

Q. What officers did you talk to?

A. I am sure I talked to Mr. Hopkins, and I don't remember who the other officers are.

Q. From whom did you receive the information that appears in the verification just above the Hopkins' signature there? [76]

A. Well, I don't recall. I could have received it either from the corporation papers or from Mr. Hopkins himself.

Q. And you have no independent recollection of that? A. I do not.

Q. Did you swear Mr. Hopkins at the time that he signed that?

A. I have no independent recollection of that, but that is my practice.

Q. And you had no particular purpose for not following that practice on this occasion, did you?

A. I did not.

Q. And for all intents and purposes you did follow that practice? A. Yes, sir.

Q. And to your knowledge Mr. Hopkins did not

(Testimony of Max R. Nicolai.)

pear before you and signed that, is that correct?

A. Yes, sir.

Q. And you don't recognize him here today?

A. Well, I am not sure. I would say it is the man sitting in the front row, the one in the middle, but I am not absolutely positive.

Mr. Harris: Your witness.

Mr. Spiller: No questions if the Court [77] please.

The Court: You may step down.

(Witness excused.)

Mr. Harris: May Mr. Nicolai be excused?

The Court: Any objection?

Mr. Spiller: No objection.

The Court: He may be excused and may go on about his business if that is his wish.

Mr. Harris: I would like to call Mr. Whittall if he is present yet.

(No answer.)

The Court: There is no response.

Mr. Harris: I will call Mrs. Schwier.

DIXIE SCHWIER

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harris:

Q. Would you state your name, please?

A. Dixie Schwier—S-c-h-w-i-e-r.

(Testimony of Dixie Schwier.)

Q. And what is your address, Mrs. Schwier?

A. 4502 West Concord, Seattle. [78]

Q. And generally in what section of the city is that?

A. In West Seattle.

Q. Are you familiar with the White Center Athletic Club?

A. Yes.

Q. And where it is located?

A. Yes.

Q. Have you ever been there?

A. Yes.

Q. And do you know Mrs. Johnsen who testified here earlier this morning?

A. Yes, I do.

Q. Do you belong to any organization similar to the one that she belongs to?

A. It is the same Orthopedic Guild, the Dr. Edward Lincoln Smith Guild.

Q. Now, have you ever been to the White Center Athletic Club?

A. Yes, I have.

Q. Have you ever been there and contacted any of the defendants who are on trial here today?

A. Yes.

Q. Whom did you contact?

A. A Mr. Hopkins. [79]

Q. And do you know when that was?

A. I know approximately.

Q. And when was it?

A. In January of 1952.

Q. And where was it?

A. At the White Center Athletic Club.

Q. And do you know about what time it was?

A. Only that it was in the evening after dinner, but not late.

(Testimony of Dixie Schwier.)

Q. And who was with you, if any one, at that time? A. My husband.

Q. And where was it if any conversation took place with Mr. Hopkins?

A. In the vestibule of the club.

Q. And what did you say to him, if anything?

A. We were making arrangements for a dinner dance that our Guild wanted to have, and as ways and means chairman I wanted to make the final arrangements about the dinner, the cost of the dinner, and the arrangements for serving drinks.

Q. And what, if anything, did he say to you in response to that?

A. That the club would furnish dinner at fifty cents a plate, I believe, that we could charge whatever we wanted to, the proceeds to go to the Orthopedic Hospital, [80] that our members and our guests could buy drinks at the club, regular drinks at fifty cents and fancier drinks at, I believe, sixty cents or sixty-five cents perhaps.

Q. And how long did this conversation take place?

A. Oh, I should say not over ten or fifteen minutes.

Q. Were those arrangements offered by Mr. Hopkins accepted by you? A. Yes.

Q. And were arrangements made then to have this dinner dance? A. Yes.

Q. And when was the dinner dance to be held?

A. February 29th.

Q. Of what year? A. 1952.

(Testimony of Dixie Schwier.)

Q. And did you hold such a dance on that day?

A. Yes, we did.

Q. Did you attend it? A. Yes, I did.

Q. What time of the evening did you first arrive there on February 29, 1952?

A. I should say around seven o'clock. We had arranged to have several guests and we wanted to be there to meet them because we had a large table.

Q. And that was in the evening, wasn't it? [81]

A. Yes.

The Court: What date in February, did you say?

The Witness: February 29th. I remember it because it was Leap Year Day, 1952.

The Court: You may inquire.

Q. (By Mr. Harris): And after you arrived there, what, if anything, did you do?

A. We had cocktails before dinner. We had planned to have dinner served at 8:00 or 8:30 or thereabouts.

Q. And how did you go about getting those cocktails?

A. The same as in any club. We ordered from the waitress or from the bartender. Some of the men ordered from the bartender because the group was getting quite large, and the waitresses were pretty busy.

Q. What type of cocktails did you order?

A. Well, just regular highballs mostly, I believe.

Q. What did they contain?

A. Whisky and water or Scotch and soda or similar.

(Testimony of Dixie Schwier.)

Q. And what, if anything, did you pay for those drinks? A. Fifty cents.

Q. And do you know what liquor was used to fix those cocktails?

A. I haven't any idea. It wasn't our [82] concern.

Q. Did you bring any liquor with you?

A. No. We didn't.

Q. Did your husband? A. No.

Q. Did any members of your party or your guests? A. No.

Q. Did any member of the Guild, as far as you know, bring any liquor with them? A. No.

Q. Did other members of the Guild buy liquor in the same manner you did? A. Yes.

Mr. Spiller: Object to that, if the Court please. It is not the best evidence of that.

The Court: That objection is overruled.

Mr. Toulouse: I object to the form of the question, your Honor.

The Court: The objection is overruled. Proceed.

Mr. Harris: Your witness.

Cross-Examination

By Mr. Toulouse:

Q. Will you now look at Plaintiff's Exhibit 3 which is before you? Do you recall having seen [83] the original of that list?

A. Just a glance, I believe. It wasn't given to me, but Mrs. Johnsen, to whom it was given. I do

(Testimony of Dixie Schwier.)

recall her saying: "I wonder what I am supposed to do with this," and I didn't know either.

Q. You do recall seeing it?

A. Yes; just briefly.

Mr. Toulouse: That is all.

Mr. Harris: May Mrs. Schwier be excused, your Honor?

The Court: Mrs. Schwier is excused from the stand.

(Witness excused.)

Mr. Harris: May she be excused from further attendance?

The Court: Any objection?

Mr. Toulouse: No objection.

The Court: You are excused and may go on about your business if that should be your wish.

Mr. Harris: Mrs. Noble.

LIDA ANDRA NOBLE

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as [84] follows:

Direct Examination

By Mr. Harris:

Q. Would you state your name, please, and spell it?

A. Lida Andra Noble—L-i-d-a Andra A-n-d-r-a Noble N-o-b-l-e.

Q. Mrs. Noble, where do you reside?

A. West Seattle, 10615 Marine View Drive.

(Testimony of Lida Andra Noble.)

Q. And are you acquainted with Mrs. Schwier and Mrs. Johnsen?

A. Yes. They belong to the same Orthopedic Guild which I do, Dr. Edward Lincoln Smith Guild.

Q. And did you belong to that Guild on February 29, 1952? A. Yes.

Q. Did you attend a dinner dance given by that Guild on that date? A. Yes.

Q. Where was that?

A. At the White Center Athletic Club.

Q. And that evening—do you recall Mrs. Johnsen and Mrs. Schwier being present on that evening?

A. Oh, yes.

Q. What time did you arrive there on that evening? [85]

A. Well, I think it was around 7:30. I came early to help Mrs. Johnsen take the money at the door and the tickets.

Q. And you did that, did you?

A. Yes, I did.

Q. During the course of the evening, did you partake of any of the refreshments out there?

A. Yes, I did.

Q. What, in particular?

A. You mean the food or the liquor?

Q. Well, both. Did you do both?

A. Yes. I had dinner there. I don't remember what it was. They had turkey and fish, I think, for dinner, your choice.

Q. Did you have any drinks?

A. I had two daiquiris before dinner.

The Court: Two what?

(Testimony of Lida Andra Noble.)

The Witness: Two daiquiris.

The Court: Spell it.

The Witness: I don't know how to spell it.

The Court: What are they?

The Witness: It is a rum mixed drink.

Q. (By Mr. Harris): And what procedure did you follow in ordering that drink or those [86] drinks?

A. Well, the waitress came around to our table and asked what we wanted, and I told my husband what I wanted, and he told the waitress and he put the money on the table, and she picked it up.

Q. Did it contain alcohol as far as you know?

A. Well, as far as I know, I would certainly judge it did.

Q. And how many drinks did you say you had there? A. I had two.

Q. Two of the same kind? A. Yes.

Q. During the course of the evening, did you receive anything from any of the employees or members out there?

A. Yes, I did. I received a list of liquors from Charlotte Fulford. I later found out her name was. She was a young girl. She came to me as I sat at the door, as I was taking the money and the tickets, and she came over and handed me a list of liquors and said: "This is a list of the liquors that we have for your Orthopedic Guild. They are behind the bar with your name on them, and if we have any trouble with the State Liquor Board about——." Well, now, I can't remember the exact words, but the idea was

(Testimony of Lida Andra Noble.)

that if they had any trouble, anybody came in to inquire about a liquor license—— [87]

Mr. Toulouse: Now, I ask that that all go out.

The Court: You will either have to state what she said or the substance and effect of her words.

A. Well, the substance was that we were to claim the bottles behind the bar, the list of bottles that she had listed on the paper as ours, and say that we had brought them.

The Court: Under what circumstances did she say you would do that, if she made any such statement?

The Witness: If they had trouble about a liquor license.

Mr. Toulouse: I still move it be stricken, because it is still hearsay as to any of these defendants. There is no connection between the alleged person who spoke to this woman outside of the presence of these defendants.

The Court: Subject to further proof to connect this person up with the establishment, the objection is overruled. You may renew the objection if it is not properly done.

Q. (By Mr. Harris): As far as you know, who was Charlotte Fulford?

A. She was the person to whom I paid the money for our dinners.

The Court: Where? At what place? [88]

The Witness: At the White Center Athletic Club.

The Court: On what date?

(Testimony of Lida Andra Noble.)

The Witness: February 29, 1952.

The Court: You may inquire.

Q. (By Mr. Harris): Do you recall what the list was that she gave to you on that evening?

Mr. Toulouse: I object to that on the grounds that the list is the best evidence.

The Court: The objection is overruled. Answer yes or no.

The Witness: Would you repeat the question?

The Court: Read it.

(Last question read by the reporter.)

A. Do you mean could I tell you exactly what was on the list?

Q. To the best of your recollection, yes.

A. I couldn't. I'm sorry. It was just a list of various different kinds. There was Seagram's on it and Old Crow. I glanced at it as I was busy taking money and taking tickets, and I didn't read it, memorize it.

Q. What is your best recollection as to the information contained on the list?

Mr. Toulouse: The witness has answered that question—that she just glanced at it and has no [89] recollection.

The Court: The objection is overruled. I do not believe that she has answered the question directly.

Mr. Harris: May Plaintiff's Exhibit 3—

The Court: Do you withdraw that last question stated by you?

Mr. Harris: No. I think she answered it.

(Testimony of Lida Andra Noble.)

The Court: She may have made an answer before you asked the question, but I do not think she has answered the question. She may have made a statement as to something that was not before her.

Mr. Harris: May the question be read to her?

The Court: Yes.

(The last question was read by the reporter as follows: "What is your best recollection as to the information contained on the list?")

A. My best recollection is that it was a list of liquors.

Q. Did it designate the number of bottles, do you know?

Mr. Toulouse: I object to that.

The Court: The objection is overruled.

A. I don't remember.

Q. If you were able to see the list or a copy [90] of the list, would that assist you in any way?

A. Yes, it would.

Mr. Harris: May Plaintiff's Exhibit 3 be shown to the witness?

(Plaintiff's Exhibit 3 handed to the witness.)

Q. (By Mr. Harris): Mrs. Noble, would you look at Plaintiff's Exhibit 3 for identification and read it over and see if, after you have read it over, that assists you in any way in refreshing your recollection as to the list that you saw that evening?

A. This looks like a photostatic copy of it.

Q. Well. I want you to answer my question if

(Testimony of Lida Andra Noble.)

you can. A. I would say definitely it was.

Q. Well, my question——

The Court: Read the question.

Mr. Harris: Listen to my question.

(Question read by the reporter as follows:

“Mrs. Noble, would you look at Plaintiff’s Exhibit 3 for identification and read it over and see if, after you have read it over, that assists you in any way in refreshing your recollection as to the list that you saw that evening?”)

A. It does refresh my memory. [91]

Q. Now, what is your testimony then as to what the list that you received on February 29, 1952, what its contents were?

Mr. Toulouse: I object to that. The list is still the best evidence. She says that she had no recollection as to what is on the list. Therefore, the list is the best evidence and whatever may or may not have been on it.

The Court: The objection is overruled. Will you read the question that is before the witness?

(Last question read by the reporter.)

The Court: Well, if you are going to have the contents read——

Mr. Harris: No. Just her recollection.

The Court: Well, the objection is sustained to the question. The question, in effect, in my opinion, calls for her to state the contents of a written document.

Mr. Harris: Oh, I see.

(Testimony of Lida Andra Noble.)

Q. (By Mr. Harris): Mrs. Noble, now after having refreshed your recollection with Plaintiff's Exhibit No. 3 for identification, will you state what your recollection is now of the contents of the list that you saw on February 29, 1952?

A. It had the name of our Guild, the Dr. Edward Lincoln Smith Guild, on it. It had a list of liquors [92] and the number of bottles beside each name of the liquor.

Mr. Harris: All right. Your witness.

Cross-Examination

By Mr. Toulouse:

Q. Mrs. Noble, do you know where the original of that list is? A. No, I don't.

Q. You have no way of identifying that as a photostatic copy of the list? A. No.

Q. And you don't know whether or not that is or is not a copy, do you? A. No.

Mr. Toulouse: That is all.

Redirect Examination

By Mr. Harris:

Q. To whom did you give that list, the original?

A. I gave it to Mr. Johnsen and told him to give it to his wife.

Mr. Harris: All right. That is all.

The Court: Step down. [93]

(Witness excused.)

Mr. Harris: May Mrs. Noble be excused?

Mr. Toulouse: No objection.

The Court: Mrs. Noble may be excused.

Mr. Harris: Mr. Turner.

DEAN S. TURNER

called as a witness by and on behalf of plaintiff,
having been first duly sworn, was examined and
testified as follows:

Direct Examination

By Mr. Harris:

Q. Would you state your name, please?

A. Dean S. Turner.

Q. And your address, Mr. Turner?

A. 10419 S.E. 13th Street, Bellevue, Washington.

Q. And what is your occupation, Mr. Turner?

A. Enforcement officer for the Washington State
Liquor Control Board.

Q. And how long have you been so employed?

A. Since June of 1947.

Q. Were you serving in that capacity during the
period beginning on July 1, 1951, and ending on
May 8, 1952? A. I was. [94]

Q. Do you know of the White Center Athletic
Club? A. I do.

Q. Do you know where it is located?

A. I do.

Q. Where?

A. 9616-17th S.W., Seattle, King County, Wash-
ington.

(Testimony of Dean S. Turner.)

Q. And have you ever been to that establishment? A. I have.

Q. When were you there the first time?

A. The first time was in May of 1950.

Q. Well, let me bring you up to this period now. When were you there, the first time you were there, during the period July 1, 1951, to May 8, 1952?

A. October 26, 1951.

Q. What time of the day were you there?

A. Just after midnight, about 12:15.

The Court: What was the date?

The Witness: October 26, 1951.

Q. Who accompanied you there, if any one?

A. Enforcement Officer Patrick E. Burke and Enforcement Officer Harold W. Booth of the Washington State Liquor Control Board, and other officers of the Board and the County Sheriff.

Q. Did you go on the premises on that particular evening? [95] A. I did.

Q. Did you see any of the defendants there at that time? A. I did.

Q. Who, if any of them, did you see?

A. Russell Felton.

Q. Do you see him here in court today?

A. I do.

Q. Would you mind signifying, if you can, from the witness stand which one of the defendants Russell Felton is?

A. He is the man to my left on the front bench at the right-hand side of the courtroom.

(Testimony of Dean S. Turner.)

Mr. Harris: May it be stipulated that he has pointed out Russell Felton?

Mr. Spiller: Yes.

Q. (By Mr. Harris): What, if anything, did you see Mr. Felton do on that particular evening?

A. He was tending the bar inside the premises.

Q. What, if anything, did you do on that particular evening?

A. I entered the premises and seized the intoxicating liquors which were found there behind the bar.

Q. How much liquor did you seize? [96]

A. Four hundred and twenty bottles of spiritous liquor and some two hundred-plus bottles of beer, malt liquor.

Q. The four hundred bottles of liquor that you seized, was that all unbroken seals or broken seals?

A. A part of it was the unbroken seal, that is full and sealed with the Government seal. Part of it was open bottles.

The Court: How many bottles of malt liquor did you say you found?

The Witness: In excess of two hundred, your Honor. I believe 250 or 270 bottles and cans, a combination.

Mr. Toulouse: Your Honor, I am going to continue to permit this witness to be interrogated as to what he did, but subject to the Court's permitting me to say that I will make a motion to suppress this evidence if it appears that this individual seized this—whatever he seized—without a warrant and not pursuant to some lawful authority.

(Testimony of Dean S. Turner.)

The Court: You had better make your objections. You will have to make the record, and I will rule on your objections at the time made.

Q. (By Mr. Harris): Were there any Federal officers with you at this time? [97]

Mr. Toulouse: Just a minute. I object to and move to strike what the witness has heretofore testified to with respect to his seizing 420 bottles of spiritous liquor on the ground that there is now no showing as yet of any relevancy between this liquor and the White Center Athletic Club or any showing as to its ownership or any showing as to the fact that the sealed liquor was liquor or any showing that it was the property of any of these defendants or any showing that any of these defendants were selling it.

The Court: The motion is denied. Objection overruled.

Q. (By Mr. Harris): Were there any Federal officers with you on this occasion?

A. No, just the State and County officers executing a search warrant from the State Court.

Q. And was there anything unusual about the bottles that were not broken, about the seals, or the ones that were broken?

A. Well, not particularly unusual. Some of the opened bottles have what we call pouring spouts, dispensing spouts, in the neck of the bottles.

Q. Did you have a conversation with Mr. Felton at that time? [98] A. I did.

Q. Who else was present?

(Testimony of Dean S. Turner.)

A. Officers Booth and Burke of the Washington State Liquor Control Board.

Q. What, if anything, did you say to Mr. Felton at that time?

A. I inquired of the operation, was he selling whisky?

Q. What did he say, if anything?

A. No. He was selling service, operating a bottle club.

Q. Is that what Mr. Felton said? A. Yes.

Q. Did you ask him anything else?

A. I asked him to see the Federal retail liquor dealer's tax stamp.

Q. And what, if anything, did he say then?

A. He did not know if they had one or, if so, where it was.

Q. Did you have any further conversation with him?

A. Not that comes to my memory at this moment, counsel.

Q. All right. Did you go out to the White Center Athletic Club on a subsequent occasion?

A. I did. [99]

Q. When was the next time that you went there?

A. January 18, 1952.

Q. Who went with you, if anyone?

A. Enforcement Officers Patrick E. Burke and H. W. Booth of the Washington State Liquor Control Board.

Q. What time on November 18th—excuse me—January 18th, 1952, did you go there, if you recall?

(Testimony of Dean S. Turner.)

A. In the evening, before the midnight hour, about 11:20—11:30 p.m.

Q. And were there any Federal officers with you? A. None.

Q. Did they know that you were going there, as far as you know?

Mr. Spiller: I object to that, if the Court please.

The Court: The objection is overruled.

A. I have no knowledge that they knew.

Q. And why did you go there?

A. To execute a State search warrant.

Mr. Toulouse: I object to that. Why he went there is immaterial.

The Court: The objection is overruled.

Q. (By Mr. Harris): Did you see any of the defendants there on that occasion? [100]

A. I did.

Q. Who, if any? A. Bert DePierris.

Q. And what, if anything, was he doing when you arrived there?

A. He was tending the bar on the premises.

Q. Did you see any other of the defendants there on that occasion? A. I believe not.

Q. Did you see any liquor on the premises at that time? A. I did.

Q. And where did you see it?

A. Behind the bar.

Q. And how much of it did you see?

A. Well, there were about 150-plus bottles of spiritous liquor and a quantity of malt liquor, beer.

(Testimony of Dean S. Turner.)

Q. And what, if anything, did you do with that liquor?

A. Took it into custody, seized it under the warrant.

Q. And were there any broken or unbroken seals in that liquor?

A. There was both, both unbroken seals and broken sealed liquor.

Q. Are you able to estimate the number of each type? [101]

A. There were several unbroken. I don't know the exact count, counsel.

Mr. Harris: May this be marked?

The Court: It may be marked Plaintiff's Exhibit No. 6 for identification.

(Inventory and Receipt marked Plaintiff's Exhibit 6 for identification.)

Q. (By Mr. Harris): Mr. Turner, you are being handed Plaintiff's Exhibit No. 6 for identification. Will you state what that is, if you know?

A. A receipt for property seized by the Washington State Liquor Control Board.

Q. Is that the original or a copy?

A. A copy.

Q. To whom did you give the original, if any one?

A. To Hon. Guy B. Knott, Justice of the Peace, Seattle Precinct, King County, Washington.

Q. And is this an exact copy of the original?

A. Yes, made at the same time as the original

(Testimony of Dean S. Turner.)

by use of carbon paper, made several copies.

Q. Who made that?

A. Officer Booth and I, in combination, made this list. [102]

Q. And in whose possession has it been since that time?

A. A part of the Washington State Liquor Control Board file in possession of the Board in my office.

Q. And is it part of the official records of that Board? A. It is.

Q. And you brought them here today, have you?

A. I did.

Q. And does your signature appear on there?

A. It does.

Q. And the signature of Mr. Booth?

A. Yes.

Q. Have you stated what it is?

A. A list of spiritous and malt liquors.

Q. Pertaining to what?

A. Pertaining to the property seized from the White Center Athletic Club, Incorporated, 9616 17th S.W., King County, Washington, on January 18, 1952, at the hour of 11:20 p.m.

Mr. Harris: I will offer Plaintiff's Exhibit 6.

Mr. Spiller: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 6 received in evidence.)

Q. (By Mr. Harris): Did you have a conversation with Mr. DePierris on January 18, 1952?

(Testimony of Dean S. Turner.)

A. I did.

Q. Where was this conversation?

A. Behind the bar and again in the reception room at the front of the premises and then in the automobile later.

Q. All right. Let's take the first one then, behind the bar. Who else was present when you had the conversation?

A. Officer H. W. Booth and Officer Patrick Burke of the Washington State Liquor Control Board.

Q. What, if anything, was said to Mr. DePierris at that time?

A. We asked if he was selling liquor. He told us no; he was selling a service, charging only for serving liquor.

Q. Was that all at that time?

A. That was the major portion of that particular conversation.

Q. Who was present at the time you had the conversation with him in the lobby or the entrance?

A. Well, it is the entrance between the check room and the bar room itself. Officer Burke was present there. [104]

Q. What, if anything, did you say to Mr. DePierris at that time and what did he say to you?

A. I inquired to see the retail liquor dealer's Federal tax stamp for the premises.

Q. What did he say, if anything?

A. He didn't know about the stamp, in fact, didn't know what such document was, and I proceeded to explain to him that it was a Federal tax

(Testimony of Dean S. Turner.)

for selling liquor. He again told me he wasn't selling liquor; he was only serving liquor for a service charge.

Q. You say you had another conversation with him in an automobile? A. Yes.

Q. And who, if any one besides yourself and Mr. DePierris, was present at that time?

A. Officer Booth of the Liquor Board.

Q. And what did you say to Mr. DePerris at that time and what did he say to you, if anything?

A. Well, that was principally Mr. Booth's conversation. I was in it and listened to it. It was about the Federal stamp, the Federal retail liquor dealer's tax stamp.

The Court: He has not answered the question and has not said he did not know the answer. Do you withdraw the question? [105]

Mr. Harris: Under the circumstances that he himself did not conduct the conversation, yes.

Q. (By Mr. Harris): What did you overhear Mr. DePerris and Mr. Booth discuss in the automobile on that particular occasion?

A. The Federal retail liquor dealer's tax stamp. Mr. Booth explained to him what the document was and what it was for, and he seemed to be enlightened by the conversation.

Q. All right. After January 18, 1952, did you go out to the White Center Athletic Club on another occasion? A. I did.

Q. When was that? A. February 4, 1952.

Q. And do you recall what time it was then?

(Testimony of Dean S. Turner.)

A. Late evening, 10:45 p.m.

Q. And with whom did you go?

A. Enforcement Officer Patrick Burke of the Liquor Board, Enforcement Officer Harold Booth of the Liquor Board, and other officers.

Q. Were there any Federal officers with you on that occasion? A. No. [106]

Q. To your knowledge, do you know whether or not they knew about your going out there at that time? A. No.

Q. Why did you go out there?

A. To execute a State search warrant to search for liquor.

Q. What happened, if anything, after you arrived there?

A. We entered, stood by the bar a few moments. The room was in partial darkness, a film being shown. Observed Mr. Peter Desimone and Mr. Bert DePierris tending the bar there, pouring liquor into glasses and serving the same and putting the money in the cash register.

Q. Did you see any of the other defendants there that evening?

A. Mr. Harold Hopkins was at the door.

Q. What door?

A. The door to the check room which opens both into the barroom and into the reception room.

Q. What, if anything, was he doing there at the door? A. He was tending the door.

Tre Court: Who was that?

The Witness: Harold Hopkins. [107]

(Testimony of Dean S. Turner.)

Q. (By Mr. Harris): Did he see you, to your knowledge?

A. After we came in, he did, yes.

Q. What if anything did you do after you got inside?

A. Went behind the bar, talked to Mr. Desimone, seized thirteen bottles of spiritous liquor.

Q. Were the seals on those thirteen bottles broken or not broken?

A. Some of both, counsel.

Q. Did you have any conversation with Peter Desimone on that particular occasion?

A. I did.

Q. Who else was present when you had that conversation?

A. Officer Harold Booth of the Liquor Board.

Q. Where was this conversation held?

A. Behind the bar and again in the same location up at the front of the building next to the check room.

Q. In the conversation that you had with Mr. Desimone behind the bar, what did you say and what did he say, if anything?

A. We asked which of the bottles was house stock, meaning property of the club. Mr. Desimone pointed out thirteen which he identified to us as house stock.

Q. And are those the thirteen bottles that you just mentioned that you seized? [108]

A. Yes.

(Testimony of Dean S. Turner.)

Q. Was there any further conversation there behind the bar at that time?

A. Not particularly.

Q. Did you then have a conversation with him out in the vestibule or the waiting room?

A. Yes, I did.

Q. Who was present then?

A. Officer Patrick Burke.

Q. What if anything did you say to him then and what if anything did he say to you?

The Court: You mean Patrick Burke?

Mr. Harris: No. Excuse me, Your Honor.

Q. (By Mr. Harris): Who else beside Mr. Burke and yourself were present at this conversation?

A. Mr. Desimone and Mr. Hopkins a part of the time.

Q. What was the conversation there?

A. He inquired of Mr. Desimone to see the retail liquor dealer's Federal tax stamp for the premises.

Q. And what did he say, if anything?

A. That they didn't need one because they weren't selling whiskey; they were just selling service.

Q. Was Mr. Hopkins present when this conversation was had? [109]

A. He was there in that area, general area, the small checkroom.

Y. Did he participate in the conversation?

A. Not with me personally.

(Testimony of Dean S. Turner.)

Q. Did you have any further conversation with Mr. Desimone at that time?

A. Yes. We talked about the tax stamp at some length, and I made the rather broad comment to Mr. Desimone that he had been in the game a long time; he should know better than to operate a liquor place without a tax stamp; that he was flirting with the penalty to McNeill Island, and it was more of a joke than anything else, and we laughed it off as such.

The Court: Read the entire answer.

(Last answer read by reporter.)

Q. (By Mr. Harris): Was there any further conversation then at that time with Mr. Desimone?

A. Yes, quite a lot. I don't recall specifically the exact conversations. We talked for some time about the stag party that was in progress there. It was a Lions Club stag party, 250 male patrons there. General conversation about the party, about the liquor.

Q. Now, did you see Mr. DePierris there that evening?

A. Yes. He was aiding Mr. Desimone in attending at [110] the bar.

Q. Did you have a conversation with him at that time?

A. I asked him about the liquor service. He, too, informed me he was selling service, not liquor.

Q. Did you have a conversation with Mr. Hopkins there at that time?

A. Yes, I did.

(Testimony of Dean S. Turner.)

Q. Who else was present then?

A. A Mr. Blumquist and Mr. Tinker and Mr. Desimone.

Q. And what was the conversation that you had with him at that time?

A. Mr. Hopkins informed me that the Lions Club, which was holding this stag party, had brought a quantity of liquor there to be served that evening consisting of some fifty bottles of liquor, Scotch, vodka, and bourbon and blended whiskies.

Q. Was there any further conversation?

A. Not particularly.

Q. Did you go back to the White Center Athletic Club at any time after the February 4th stag party?

A. I did.

Q. When was that?

A. That was the early morning of March 1, 1952.

Q. At approximately what time?

A. 1:30 I would judge. Officer Burke and I [111] went there with other officers of the Liquor Board and the Sheriff's Department.

Q. Were there any Federal officers there with you at that time? A. No.

Q. As far as you know, did they have any knowledge of your going there on that particular occasion?

A. They had no knowledge.

Q. Why did you go there?

A. To execute a State search warrant.

Q. What, if anything, did you find going on when you arrived there?

A. There were a great number of people there

(Testimony of Dean S. Turner.)

drinking at tables. Mr. Felton and Mr. DePierris were both tending bar. There had been a large crowd of ladies there. I spoke with a few of them.

Q. Do you know what function, if any, was taking place?

A. There had been a gathering of the Dr. Edward Lincoln Smith Orthopedic Guild group there that evening on February 29th, which was Leap Year evening, and this was the early morning following that, past the midnight hour.

Q. When you saw Mr. DePierris and Mr. Felton, where were they?

A. They were both behind the bar. [112]

Q. And what, if anything, did you do?

A. Walked behind the bar, talked with them, seized the spiritous liquor and the malt liquor found there behind the bar.

Q. How much liquor did you seize?

A. In excess of fifty bottles of the spiritous liquor.

Q. And were any of those bottles sealed with unbroken seals?

A. There was a combination of both, some full sealed bottles and some open bottles and some bottles with pouring spouts in the neck of the bottle.

Q. Did you have a conversation with Mr. Felton at that time?

A. Yes, I did.

Q. Where?

A. Behind the bar.

Q. Who else was present?

A. Well, Mr. DePierris and Mr. Burke.

(Testimony of Dean S. Turner.)

Q. And what, if anything, did you say to Mr. Felton and what did he say to you?

A. We discussed the service of the liquor. He told me he was serving the liquor which had the marking "Dr. Smith Guild" on it to the group that were there attending this dinner dance; that he was charging 50c per glass [113] served; that it was a service charge; that the liquor had been brought there by the Dr. Edward Lincoln Smith Guild.

Q. Did you ask him anything about that?

A. Yes. I questioned him in more detail about who had brought it, and he didn't know. In fact, he hadn't been there when it had been brought in, he said.

Q. Did he say anything further regarding that?

A. Well, he had just been told by his supervisor that it had been brought there, by Charlotte Fulford.

Q. Did you have any conversation with Mr. DePierris at that time? A. Yes.

Q. Who was present during this conversation?

A. Officer Burke again, I believe.

Q. And what, if anything, did you say, and what did Mr. DePierris say on that conversation?

A. We again discussed the service of the liquor and how it was carried on. Mr. DePierris explained that he, too, was serving the drinks of liquor to the Guild group at 50c a glass; that it was a service charge being charged.

Q. Now, after March 1, 1952, did you return again to the White Center Athletic Club?

(Testimony of Dean S. Turner.)

A. Yes, on March 12, 1952. [114]

Q. At approximately what time then?

A. That was early evening, 10:30 or 10:00, early evening March 12th.

Q. Who, if any one, was with you on that occasion?

A. Officer Patrick Burke of the Liquor Board and two or more officers from the Board and the Sheriff's office.

Q. Were there any Federal officers with you?

A. No, sir.

Q. As far as you know, did they have knowledge that you were going out there?

A. They had no knowledge as far as I know.

Q. Why did you go?

A. To execute a State search warrant.

The Court: May I interrupt? Will you repeat the name, nothing else, of that person you said some one told you reported delivery of the liquor by the Orthopedic Guild members? I just want the name of that person.

The Witness: Charlotte Fulford, F-u-l-f-o-r-d.

The Court: You may proceed.

Q. (By Mr. Harris): Who was there, if any one, when you arrived on March 12, 1952?

A. Bert DePierris was behind the bar. There were a group of people seated at the bar on the bar stools. [115]

Q. Were you able to observe what, if anything, they were doing?

(Testimony of Dean S. Turner.)

A. They were consuming drinks from glasses.

Q. Where was Mr. DePierris when you arrived?

A. He was behind the bar.

Q. And did you see any liquor there?

A. I did.

Q. How much?

A. I believe 52 or 56 bottles on that occasion of spiritous liquor and a quantity of malt liquor, beer.

Q. And those bottles of spiritous liquor, were the seals broken or unbroken, as far as you know?

A. Some were full and sealed; others were broken.

Q. Did you have a conversation with Mr. DePierris at that time? A. Yes.

Q. Where was that conversation?

A. That was behind the bar.

Q. Who else was present, if any one, at that time?

A. I am not sure that any one was at that conversation, counsel.

Q. What, if anything, did you say to him at that time?

A. I asked him about the Federal tax stamp as a retail dealer in liquor.

Q. And what did he say, if anything? [116]

A. That he didn't have one; that he was not selling liquor; that he was selling service.

Q. Now, after March 12, 1952, did you return there again to the White Center Athletic Club?

A. Yes, I returned April 6, 1952.

(Testimony of Dean S. Turner.)

Q. At approximately what time?

A. Early morning, after 1:00 o'clock in the morning.

Q. Who, if anyone, was with you on that occasion?

A. Officer Patrick Burke and Officer Harold Booth of the Liquor Board, and other officers.

Q. Were there any Federal officers with you at that time? A. None.

Q. As far as you know, did they have any knowledge of your going out there on that occasion?

A. As far as I know, they had no knowledge.

Q. Why did you go?

A. To execute a State search warrant.

Q. And who, if any of the defendants, did you see there on that occasion?

A. Russell Felton.

Q. Where was he when you arrived?

A. Tending bar. He was behind the bar.

Q. Did you see any liquor there at that time?

A. I did. [117]

Q. And where did you see the liquor?

A. Behind the bar.

Q. And how much?

A. I believe 22 bottles of spiritous liquor.

Q. Did any of those bottles have seals unbroken?

A. No. They were all broken sealed bottles, all open bottles. Some had pouring spouts in. Some had caps on them.

Q. Did you have any conversation with Mr. Felton at that time? A. I did.

(Testimony of Dean S. Turner.)

Q. Who was present?

A. Officers Burke and Booth of the Liquor Board.

Q. And where was this conversation?

A. Behind the bar.

Q. And what, if anything, did you say to Mr. Felton and what did he say to you?

A. Well, Mr. Felton was quite angry that Mr. Desimone and Mr. DePierris had just left according to him. He was quite angry that he had been left there, as he put it, to hold the bag on this occasion, and he informed me and the other officers that the liquor there, the 22 bottles, was house stock, that he was selling the drinks from the bottles at 50c a glass.

Q. Anything else? [118]

A. That he had been retained by Mr. Peter Desimone to tend the bar that night.

The Court: We will be at recess for five minutes.

(Recess.)

The Court: May the record show that all parties are present at this time as before the recess?

Mr. Harris: The record may so show.

Mr. Toulouse: Yes, Your Honor.

Mr. Spiller: Yes, Your Honor.

Mr. Harris: You may interrogate.

Cross-Examination

By Mr. Toulouse:

Q. On these various dates that you have related during the period 1951 and 1952 when you seized liquor, where is that liquor?

(Testimony of Dean S. Turner.)

A. That has been destroyed by the State Liquor Board under the rules of seized contraband.

Q. It has been destroyed?

A. Yes, it has.

Q. Was that liquor at any time to your knowledge analyzed to determine its nature, of your own personal knowledge, Mr. Turner?

A. No. We made no analysation because we had the [119] sealed liquor in the first five cases.

Q. You made no determination with respect to any of the liquor that was seized during that period of time?

The Court: Do you mean by that—no chemical determination?

Mr. Toulouse: Yes.

A. No. No chemical analysis was made. The usual smell test was accomplished.

Mr. Toulouse: That is all.

Mr. Harris: I don't think the witness has completed his answer.

The Court: You may ask him another question if you wish, Mr. Harris.

Redirect Examination

By Mr. Harris:

Q. Have you completed your answer as to what test you did conduct as to the broken sealed bottles?

A. The smell test, counsel.

Mr. Harris: That is all.

Mr. Toulouse: That is all. Now, I would like to

ask if Mr. Turner can remain in attendance as we may desire to call him for the defense if the Court please.

The Court: He will do that. Remain in attendance [120] in the future during the trial unless the Court otherwise directs.

You may step down from the stand.

(Witness excused.)

The Court: Call the next witness.

Mr. Harris: Mr. Booth.

Mr. Spiller: Might I interrupt for a moment? I notice that Mr. Turner is leaving the courtroom, which is perfectly proper because we wouldn't be calling him until the defense comes in, and unless he wishes there isn't any reason for him to be detained for the rest of the day.

The Court: Mr. Turner, you are excused for the rest of the day. However, you are required to be here tomorrow morning at ten o'clock. You will be here at that time in pursuance of your previous summons.

H. W. BOOTH

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harris:

Q. Would you state your name, please? [121]

A. H. W. Booth.

Q. What is your address?

(Testimony of H. W. Booth.)

A. 3235 East 104, Seattle.

Q. And your occupation?

A. Inspector, State Liquor Board.

Q. And how long have you been so employed?

A. On this assignment, about three weeks. Prior to that, I was an enforcement officer for the Liquor Board in excess of six years.

Q. And were you so employed during the period commencing on July 1, 1951, to May 8, 1952?

A. I was.

Q. Did you have occasion during that period of time to go out to the White Center Athletic Club?

A. I did.

Q. Where is that located?

A. 9616-17th S.W., Seattle.

Q. When is the first time you went out there?

A. In June of 1950.

Q. No. I mean within that period of time.

A. That would be October 26, 1951.

Q. And with whom? About what time did you go?

A. About midnight.

Q. And with whom, if any one, did you go?

A. Burke and Turner of the Liquor Board and other [122] County officers.

Q. And who of the defendants, if any of them, did you see there at that time?

A. Russell Felton.

Q. And where was he when you first saw him?

A. He was tending bar.

Q. Were there any other people in the establishment there?

(Testimony of H. W. Booth.)

A. Yes. There was a large crowd.

Q. And what, if anything, were they doing?

A. They were seated at tables. Some were playing automatic devices. Some were at the bar drinking.

Q. Did you have a conversation with Mr. Felton at that time?

A. I may have talked to him. I have no recollection of the conversation.

Q. Now, did you go out there again on another date after October 26, 1951?

A. In January, 1952, on January 18th.

Q. Do you recall approximately when on that day?

A. Prior to midnight, in the late evening.

Q. Who, if any one, went with you on that occasion?

A. Other officers of the State Liquor Board, Turner and Burke.

Q. Who, if any, of the defendants did you see there [123] on that occasion?

A. Bert DePierris and John Stepich.

Q. Where was Mr. DePierris when you first saw him?

A. Behind the bar, acting as bartender.

Q. Where was Mr. Stepich when you saw him?

A. I first saw him on the side of the bar toward the door. He and Officer Burke were in a conversation.

Q. Did you have a conversation with Mr. DePierris at that time?

A. Yes, I did.

(Testimony of H. W. Booth.)

Q. Who else was present?

A. Mr. Turner on the first conversation. There was another conversation in an automobile at which Mr. Burke was also present.

Q. The conversation that you had with him in the automobile, what, if anything, did you say and what did he say?

The Court: This is who?

Mr. Harris: Mr. DePierris.

A. I questioned him regarding an RLD stamp, a retail liquor dealer's stamp, at the club. At his instance, I explained to him what it was.

Q. In so many words, what did you say?

A. I told him it was required by the Federal Government for persons who sell liquor at retail.

Q. What did he say? [124]

A. He was noncommittal. He seemed ignorant of the law.

Q. Did you have a conversation with Mr. Stepich on that particular day? A. I did not.

Q. Did you observe liquor there on that occasion and on the previous occasion that you have mentioned? A. I did.

Q. And you heard Mr. Turner's testimony concerning the condition of the bottles and the number of the bottles, did you not?

A. Yes, I heard some of it.

Q. And would your testimony be substantially the same? A. It would be, yes.

Q. Now, after January 18, 1952, did you go there again? A. On February 4 of 1952.

(Testimony of H. W. Booth.)

Q. At approximately what time?

A. Earlier in the evening, at 11:00 o'clock.

Q. With whom did you go?

A. Again with Burke and Turner and county officers.

Q. What, if anything, was going on when you arrived?

A. The club was darkened. A film was being shown. We gained admittance through the door. The door was ajar so we merely walked in. We watched the proceedings for a [125] while. Desimone and DePierris were behind the bar, and they served a number of customers while we stood there.

Q. Whom did you see behind the bar, if any one?

A. Peter Desimone and Bert DePierris.

Q. What, if anything, were they doing?

A. Tending bar, serving customers.

Q. And did you have a conversation with Mr. Desimone at that time?

A. Yes, I did.

Q. Who else was present?

A. Mr. Turner.

Q. What, if anything, did you say to Mr. Desimone and what did he say to you?

A. I asked him point blank just why he thought he could operate without a retail liquor dealer's stamp.

Q. What did he say?

A. He stated that he was selling service and not liquor.

Q. Any further conversation?

A. He pointed out a number of bottles to us which he stated were owned by the house although

(Testimony of H. W. Booth.)

he didn't say he was selling them. He said they were owned by the club. We had a conversation in particular about a bottle of Old Crow, full and sealed, whiskey, which was seized.

Q. What did he say, if anything, about that?

A. As I recall, the bottle was not marked. He objected to our seizing it.

Q. Did you notice anything unusual about the bottles or the seals on the bottles?

A. The seals had been defaced on some. The Federal strip stamp that goes over the top of the bottle had been defaced so that the numerals weren't legible in some cases.

Q. Did you ask him concerning that fact at all?

A. I don't recall my questioning him, if I did.

Q. Did you have a conversation with Mr. De-Pierris at that time?

A. Not that I recall, sir.

Q. After February 4, 1952, did you go out to the White Center Athletic Club on another occasion?

A. On April 6 of the same year, 1952.

Q. At approximately what time?

A. After midnight.

Q. With whom did you go?

A. Burke and Turner and county officers.

Q. Who, if any one, of the defendants did you see there on that occasion?

A. Russell Felton.

Q. Where was he when you first saw him?

A. Tending bar.

Q. Did you have a conversation with him? [127]

A. Yes.

(Testimony of H. W. Booth.)

Q. Who else was present, if anyone?

A. I participated in the conversation. It was mainly between Felton and Turner and Burke. Felton was disturbed that he had been caught on that occasion. He said that this was the last time for him. Charlotte Fulford also participated in the conversation. She was trying to keep him quiet.

Q. Did he mention any of the other defendants at that time?

A. Yes. He stated that both Desimone and De-Pierris had been there earlier in the evening.

Q. Did you see any liquor there at that time?

A. Yes.

Q. And did you have any conversation with Mr. Felton or overhear any conversation that Mr. Felton had concerning that liquor?

A. At that time he admitted that he was selling the liquor over the bar.

Q. Do you recall how many bottles of liquor were seized at that time, if any were?

A. Twenty or more as I recall. They were all unsealed is my recollection.

Q. Did Mr. Felton say to whom the 22 bottles belonged?

A. Not in so many words, no, sir. [128]

Q. What did he say?

A. I don't believe he was asked who it belonged to.

Mr. Harris: I believe that is all.

(Testimony of H. W. Booth.)

Cross-Examination

By Mr. Spiller:

Q. Was Mr. Turner your superior officer at that time? A. No, sir.

Q. You were both enforcement officers for the Washington State Liquor Control Board?

A. That is correct.

Q. And were upon an equal basis so far as the Board was concerned?

A. With this exception, if I may explain it, Mr. Turner served the search warrant, and that put him in, you might say, the position of bossing that particular operation. With the exception of the raid of January 18, Mr. Turner served those search warrants. On January 18, I served the search warrant I believe.

Mr. Spiller: I have no further questions. I would like to make the same request of this witness as of Mr. Turner, that he be in attendance to be called by the defense.

The Court: While this Court is in session [129] and proceeding with the trial of this case, the Court requests that you be present unless the Court later otherwise directs.

You may step down.

(Witness excused.)

The Court: Call the next witness.

PATRICK E. BURKE

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harris:

Q. Would you state your name, please?

A. Patrick E. Burke.

Q. And your address?

A. 8835 S.E. 39th, Mercer Island.

Q. What is your occupation?

A. Deputy Sheriff for King County Sheriff's Office.

Q. How long have you been so employed?

A. Since November of 1953.

Q. Prior to that time, what was your occupation?

A. Enforcement officer for the Washington State Liquor Control Board. [130]

Q. How long were you enforcement officer for that Board? A. Approximately five years.

Q. Were you so employed during the period commencing on July 1, 1951, through May 8, 1952?

A. I was.

Q. And during that period of time did you have occasion to go to the White Center Athletic Club?

A. Yes.

Q. During that period of time, when was the first time that you went there?

A. October 26, 1951.

Q. Do you recall approximately the time?

(Testimony of Patrick E. Burke.)

A. Somewhere near midnight.

Q. Who went with you on that occasion?

A. Officer Turner and Officer Booth and some deputy sheriffs.

Q. Did you see any of the defendants there at that time? A. Yes, I did, Russell Felton.

Q. Where did you first see him there?

A. He was tending bar.

Q. Did you have a conversation with him at that time?

A. Just through overhearing Officer Turner talking to him. [131]

Q. Did you see any liquor on the premises at that time? A. I did.

Q. Where did you see that liquor?

A. On the back bar.

Q. Did you have occasion to go there again after October 26, 1951? A. Yes, I did.

Q. When was that? A. January 18, 1952.

Q. With whom did you go on that occasion?

A. Turner and Booth of the Liquor Board.

Q. Who, if any, of the defendants did you see there at that time?

A. Mr. DePierris and Mr. Stepich.

Q. Where was Mr. DePierris when you first saw him? A. He was tending bar.

Q. Where was Mr. Stepich?

A. I didn't see Mr. Stepich until later in the evening.

Q. All right. Did you have a conversation with Mr. DePierris behind the bar?

(Testimony of Patrick E. Burke:)

A. Yes, at that time I did.

Q. Who else was present?

A. Officer Turner. [132]

Q. What did you say and what did he say, if anything, at that time?

A. My questioning as far as Mr. DePierris was concerned, I was quite disgusted at the operation itself, and I told him such.

Q. That is not quite responsive. Just what did you say to him at that time? What were your words to the best of your recollection?

A. I told him that if I had my way that the place would be closed.

Q. And what did he say, if anything?

A. He made some remark in regards to losing my job perhaps.

The Court: Do you mean that you, Mr. Burke, would lose your job?

The Witness: Yes. That is correct.

Q. (By Mr. Harris): That is Mr. DePierris?

A. Yes.

Q. And was there any further conversation then between you and he?

A. I told him that I had been working there for quite some time, and I expected to work there quite some after that.

Q. Was there anything further then? [133]

A. No, and then later when we were taking him to jail I overheard Mr. Booth's conversation.

Q. In the automobile? A: Yes.

Q. How long after your conversation with Mr.

(Testimony of Patrick E. Burke.)

DePierris behind the bar did you see Mr. Stepich?

A. We had already written the inventory of the liquor that was seized, and that is when I noticed Mr. Stepich.

Q. Where did you see him?

A. Sitting at the bar.

Q. And what, if anything, did you say to him at that time?

A. It was more or less in substance previous acquaintances that I talked to him in regards to.

Q. Did you know Mr. Stepich prior to this time?

A. Yes, I did.

Q. When did you first meet Mr. Stepich?

A. When I was in the service.

Q. During the last war? A. Yes, sir.

Q. Had you seen him previously at the White Center Athletic Club? A. No, sir.

Q. Did that cover the entire conversation that you [134] had with Mr. Stepich at that time?

A. That is correct.

Q. Now, did you go out to the White Center Athletic Club after February 18, 1952? Excuse me. After January 18, 1952. A. Yes, I did.

Q. When did you go out the next time?

A. February 4, 1952.

Q. With whom did you go on that occasion?

A. Officer Turner and Officer Booth and some deputy sheriffs.

Q. And what, if anything, was taking place at the White Center Athletic Club when you arrived there on February 4, 1952?

(Testimony of Patrick E. Burke.)

A. There was a motion picture in session.

Q. Did you see any of the defendants there at that time? A. Yes, I did.

Q. Who?

A. Mr. DePierris and Mr. Felton and Mr. Hopkins—I mean Mr. Desimone instead of Felton.

Q. Would you repeat your answer as to who you saw?

A. Mr. DePierris and Mr. Hopkins.

The Court: What date?

The Witness: February 4, 1952. [135]

Q. When they were showing this movie?

A. That is right.

Q. Where was Mr. Desimone when you first saw him? A. Behind the bar.

Q. Where was Mr. DePierris?

A. Behind the bar.

Q. Where was Mr. Hopkins?

A. In the check room.

Q. Did you have a conversation with Mr. Desimone? A. No.

Q. Did you have a conversation with Mr. DePierris? A. No.

Q. Did you see any liquor on the premises at that time? A. Yes, I did.

Q. Do you recall how many bottles?

A. There were over a hundred bottles on the premises.

Q. Did you have a conversation with Mr. Hopkins? A. No, sir.

(Testimony of Patrick E. Burke.)

Q. What, if anything, did you see him doing?

A. He was standing at the door facing the bar as we entered the premises. Later, when Mr. Turner and Mr. Desimone was in conversation in the check room, Mr. Hopkins was in the vicinity of the check room. It is very small.

Q. Do you know, of your own knowledge, what if any [136] duties he was performing that evening?

Mr. Toulouse: Now, I object to that. It is assuming that he was performing some duties. This witness hasn't testified to that.

The Court: That objection is sustained.

Q. (By Mr. Harris): Do you know what, if anything, Mr. Hopkins was doing that evening?

A. No, sir, I don't.

Q. Now, after the February 4, 1952, visit by yourself at the White Center Athletic Club, did you go back again? A. Yes, I did.

Q. When was that?

A. That was March 1, 1952.

Q. With whom did you go at that time?

A. Officer Turner and deputy sheriffs.

Q. Who, if any, of the defedants did you see there then? A. Mr. DePierris and Mr. Felton.

Q. What, if anything, were they doing when you saw them? A. They were both tending bar.

Q. Did you see any liquor on the premises at that time? A. Yes, I did.

Q. Where was it? [137]

A. Behind the bar.

(Testimony of Patrick E. Burke.)

Q. Did you have a conversation with Mr. Felton at that time?

A. I don't believe I did myself, no.

Q. With Mr. DePierris? A. No, sir.

Q. After March 1, 1952, did you go back again?

A. Yes.

Q. When was that? A. March 12, 1952.

Q. With whom did you go at that time?

A. Officer Turner and deputy sheriffs.

Q. Who, if any, of the defendants did you see at that time? A. Mr. DePierris.

Q. Where was he when you first saw him?

A. He was tending bar.

Q. Did you see liquor on the premises at that time? A. Yes, sir.

Q. Where was it? A. On the back bar.

Q. And did you have a conversation with Mr. DePierris? A. I don't recall that.

Q. After March 12, 1952, did you go back to the White Center Athletic Club again? [138]

A. Yes, sir.

Q. When was that? A. April 6, 1952.

Q. Who went with you at that time?

A. Turner and Booth of the Liquor Board and some deputy sheriffs.

Q. Who if any of the defendants did you see then? A. Mr. Felton and Mr. DePierris.

Q. Where did you see Mr. Felton?

A. Behind the bar.

Q. Where did you see Mr. DePierris?

A. Behind the bar.

(Testimony of Patrick E. Burke.)

Q. What, if anything, did you say to Mr. Felton at that time?

A. During the entrance of the premises——

Mr. Toulouse: I object. He hasn't said that he said anything to Mr. Felton.

The Court: The objection is overruled.

A. I asked Mr. Felton later, after getting behind the bar, where Bert DePierris had been, and Mr. Felton looked as if to point out Mr. DePierris and he was gone.

Q. Do you know where Mr. DePierris went?

A. No, I don't.

Q. Did you have any further conversation with Mr. Felton as to Mr. DePierris? [139]

A. I asked Mr. Felton at the time that I asked where Mr. DePierris had gone. He seemed quite alarmed, and I said: "Well, it looks like you are holding the bag." And he agreed.

Q. Was there any further conversation with Mr. Felton then at that time?

A. There was by Officer Turner.

Q. And what, if any, did you overhear?

A. Mr. Turner asked Mr. Felton in regards to whether or not Mr. Desimone had been on the premises prior to our arrival, and he stated that he had been there.

Q. Did you hear Mr. Felton say anything else?

A. He also told Mr. Turner that DePierris had been there, also.

Q. And did he mention anything else?

A. Officer Turner asked him which bottles were

(Testimony of Patrick E. Burke.)

used as house bottles, which he showed him the bottles which he said was house bottles.

Q. Who showed him the bottles?

A. Mr. Felton.

Q. And where were those bottles located?

A. They were on the back bar.

Q. And were the seals broken or unbroken, if you recall? A. They were all broken. [140]

Q. Did you hear Mr. Felton say anything else?

A. Yes, to substantiate Mr. Booth's question, he did state that this was his last time.

Mr. Spiller: No questions.

The Court: You may step down.

(Witness excused.)

The Court: The Court will recess the proceedings in this case.

Mr. Harris: Before we adjourn, your Honor, may I at this time inquire if Mr. Whittal is present?

(No response.)

The Court: Is he subject to a subpoena?

Mr. Harris: Yes, your Honor, and may I at this time ask the assistance of the marshal in gaining his attendance for tomorrow morning?

The Court: The United States Marshal is directed to assist the United States Attorney in all proper ways in that regard.

Mr. Harris: Thank you, your Honor.

The Court: All of those connected with this case

are excused until tomorrow morning at ten o'clock, and they may retire at this time.

(At 4:00 o'clock p.m., Wednesday, April 21, 1954, proceedings recessed until 10:00 o'clock a.m., Thursday, April 22, 1954.) [141]

April 22, 1954, 10:00 A.M.

The Court: May the record show that each of the defendants, together with his attorneys, is present, and that Government counsel is present?

Mr. Spiller: The record may so show, your Honor.

Mr. Harris: Yes, your Honor.

The Court: You may proceed.

Mr. Harris: At the conclusion yesterday afternoon, your Honor, just to refresh both my own recollection and possibly the Court's, Mr. Burke was on the stand. I had completed direct examination and Mr. Spiller had made the remark in the record that there were no questions. I understand from Mr. Toulouse this morning that he does wish to ask Mr. Burke some questions, but Mr. Burke is not present at this time. So, with the Court's permission——

The Court: There is nothing before the Court regarding Mr. Burke having been excused from the stand, and he is not here to take the stand——

Mr. Harris: ——I am going to call Mr. Whittall.

The Court: You may proceed to do so.

Mr. Harris: Mr. Whittall, will you take the stand? [142]

RODERICK W. WHITTALL

called as a witness by and on behalf of plaintiff,
having been first duly sworn, was examined and
testified as follows:

Direct Examination

By Mr. Harris:

Q. Would you state your name, please?

A. Roderick W. Whittall.

Q. And your address, Mr. Whittall?

A. At the time, 109 East 59, Seattle, Washington.

Q. What is your present occupation?

A. Electrical engineer, U. S. Navy.

Q. Have you ever served in any capacity with
the Washington State Liquor Control Board?

A. Yes, I have.

Q. And in what capacity?

A. As an investigator.

Q. During what period of time?

A. Just during the year of 1952.

Q. Were you so engaged on March 9, 1952?

A. Yes, I was.

Q. Are you familiar with the White Center
Athletic Club? A. Yes, I am. [143]

Q. Have you ever been there?

A. Yes. I was there on March 9, 1952.

Q. At approximately what time?

A. Midnight, 12:15 a.m.

Q. And with whom if any one, did you go there?

A. With another investigator, Berch West.

Q. Did you gain admittance to the club?

(Testimony of Roderick W. Whittall.)

A. I gained admittance by being in a party of friends of Mr. West.

Q. And what, if anything, did you do after you entered the White Center Athletic Club?

A. After being admitted, of course we immediately went to the bar and ordered our drinks.

Q. From whom did you order the drinks?

A. Naturally I ordered from the bartender. Later I learned his name was Bert, other customers speaking of him, calling his name.

Q. And what kind of a drink did you order?

A. A 7-high, whiskey and 7.

The Court: What is that?

The Witness: It consists of whiskey and 7-Up.

Q. And were you served such a drink?

A. By the taste, yes, and color.

Q. And did you pay for the drink?

A. Paid for the drink. [144]

Q. Did you bring any alcohol onto the premises?

A. I did not.

Q. Did you have any there previously?

A. No, I hadn't.

Q. And what, if anything else, happened that evening?

A. Well, of course, after ordering the drink I immediately left the bar and walked over to the so-called one armed bandits and began to play them. When I returned, my drink was there, of course, but the other party had left.

Q. Who is that other party?

A. Berch West, the other investigator. Not knowing what happened to him, I just sat there

(Testimony of Roderick W. Whittall.)

and continued on drinking. Upon completing my approximate second swallow of the drink, I was asked by the other bartender, which was later identified as Russell Felton, if I was with Mr. West, and I said yes, I was, and so he said: "Well, he was a liquor investigator. So you will have to leave." And that is all there was to it. He removed my drink and I left.

Mr. Harris: Your witness.

The Court: Did anybody pay for your drink? If so, who?

The Witness: No, I left the money on the bar myself.

Q. (By Mr. Harris): How much did you pay for it? [145] A. Fifty cents.

Mr. Harris: Your witness.

Cross-Examination

By Mr. Toulouse:

Q. You don't know who, if any one, picked up your money, do you?

A. No. I just left it on the bar and then walked over to the machine.

Q. What day of the week was March 9th?

A. I could not tell you that. I don't remember.

Q. Did you see Mr. West buy eight drinks on that occasion?

A. No. I don't believe at that time he bought eight drinks.

Q. Did you see him buy any drinks?

(Testimony of Roderick W. Whittall.)

A. He bought one for himself.

Q. When you say he bought one, did you see him put money on the bar?

A. We both had our 50c on the bar at that time.

Q. But you never saw any one take that?

A. No. I did not.

Mr. Toulouse: That is all.

Mr. Harris: That is all. [146]

Mr. Harris: May Mr. Whittall be excused?

Mr. Spiller: No objection.

The Court: You may be excused from further attendance as a witness in this case. Step down.

(Witness excused.)

Mr. Toulouse: Your Honor, Mr. Burke is here, and if you will read the record back, I did not waive any cross-examination of Mr. Burke. I have checked with the reporter myself, and I want to examine Mr. Burke.

The Court: You have that privilege.

PATRICK E. BURKE

recalled as a witness by and on behalf of plaintiff, having been previously sworn, was examined and testified further as follows:

Cross-Examination

By Mr. Toulouse:

Q. Mr. Burke, you have heretofore testified that on October 26, 1951; January 18, 1952; February 4, 1952; March 1, 1952; March 12, 1952, and

(Testimony of Patrick E. Burke.)

April 6, 1952, that in the company of Mr. Turner and Mr. Booth, enforcement officers of the Washington State Liquor Control Board, that you went to the premises located in White Center known as the White Center Athletic Club and at that time either served a search warrant or aided the other two officers [147] in the execution of a search warrant, is that correct?

A. That is correct, with the exception of two dates.

Q. What two dates?

A. March 1 and March 12, Officer Booth was not there.

Q. Officer Booth was not with you but Officer Turner was? A. That is correct.

Q. Now, you were out there for the enforcement of what is known as the Steele Act in the State of Washington, is that correct?

A. That is correct.

Q. And it is your practice, is it not, and the practice of Officer Turner and Booth, on an occasion of raiding a place, or particularly on the occasions that I have given you, that is on those particular dates that I have given you, to make a determination as to the status of the individuals at the particular place that is raided, is that not true?

A. That is true.

Q. Now, did you make a determination as to the status of Russell Felton? Wasn't he an employee of that establishment at that time?

A. Yes. I would say he was.

(Testimony of Patrick E. Burke.)

Q. On those occasions? A. Yes. [148]

Q. And did you make a determination as to the status of Mr. DePierris, that he too was an employee of the establishment on the particular dates that I have indicated?

A. When he was present?

Q. Yes. A. Yes.

Q. And you also made a determination, did you not, that their employer was Mr. Desimone, is that correct? A. Yes. That is correct.

Q. And that to the best of your knowledge and understanding from your conversation with Mr. Turner and Mr. Booth, that was likewise their understanding as to the status of those particular individuals, is that correct?

A. As to answering for what they thought, I have assumed that they took the same attitude that I did, yes.

Q. Well, you talked it over with them, did you?

A. Yes.

Q. The information that you had was in common on each of those occasions? A. That is true.

Q. And they all reached the same determination as to the status of Felton and the status of DePierris on all of those occasions, that it was that of an employment relationship with Mr. Desimone?

A. That is true. [149]

Q. As a matter of fact, that information was forthcoming from both bartenders, was it not?

Mr. Harris: I will object. I don't think that question is clear enough.

(Testimony of Patrick E. Burke.)

Q. (By Mr. Toulouse): I will ask you this: Did you know that Mr. Felton was employed elsewhere during the period January to March as a bartender in town?

A. He told us he was, yes.

Q. And that he was merely a part-time bartender out there? A. That is correct.

Q. And you likewise knew, did you not, that Mr. DePierris had come up from Portland in about December of 1951 and that he started tending bar out there on or about that time?

A. There was some conversation with regards to that, yes.

Q. And Mr. DePierris furnished that information, didn't he? A. Yes, he did.

Q. Now, on the occasions that I have given you in my first question and on those dates that I have indicated, the liquor was seized by yourself, Mr. Booth and Mr. Turner because, in your opinion at that time, there was a [150] violation of the Steele Act, is that not correct? A. That is true.

Mr. Toulouse: That is all.

Mr. Harris: That is all.

The Court: Step down.

(Witness excused.)

Mr. Harris: May Mr. Burke be excused?

The Court: Any objection?

Mr. Toulouse: None.

The Court: You may be excused, Mr. Burke, and go on about your business.

HAROLD E. DAGGETT

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harris:

Q. Will you state your name, please?

A. Harold E. Daggett.

Q. What is your address, Mr. Daggett?

A. 14559 22nd N.E., Seattle.

Q. What is your occupation?

A. I am an investigator for the Alcohol-Tobacco Tax [151] Division of the Treasury Department, United States Government.

Q. And where are you stationed?

A. Seattle.

Q. How long have you been so employed?

A. Between 25 and 26 years.

Q. Were you employed in that capacity during the year 1952? A. I was, sir.

Q. In the exercise of your duties, did you have occasion to come in contact with an establishment known as the White Center Athletic Club?

A. I did, sir.

Q. When? A. On May 6 of 1952.

Q. How was that contact or what did you do?

A. I went out to 9616 17th S.W., and as I entered the place, on the left there was a cloakroom, and there was a girl tending the cloakroom who I later was pointed out as Charlotte Fulford. I went up to her and put down my hat and started as if

(Testimony of Harold E. Daggett.)

I was going in, and she said: "Are you a member?" And I said: "No, I am not, but I am supposed to meet a member here." And she said: "What is the member's name?" And I give her some name of a business man that I had picked off a business establishment as I was coming along, and I don't recall just what [152] the name was now, and she said: "Just a minute." And she went through a door into the other department, and when she came back she had Mr. Stepich with her. Mr. Stepich asked me who I was looking for, and I told him the name, and he knew who it was and he went in and came back and said: "Well, they are not inside. They are not in there." And I said: "Well, can I use your phone a minute," and I went over and used the phone and I came back and said: "Well, they said it is all right. They are coming over in a few minutes and will meet me inside."

So he stood there for a few minutes, and finally he said: "Okay," and I went into the establishment. It is a big quonset-hut establishment, and as you go in the door there is a big square bar, and I went up and sat on a stool at the bar, and Russell Felton was tending bar, and I ordered a whiskey with a ginger ale chaser, and he served it to me, and I paid him 50c for it, and I sat there, and there was, oh, quite a few people in there.

In the back of the bar, towards the back side, there was a lot of bottles, and they were serving food at these tables, and there was, I think, three waitresses serving food. There was two cocktail

(Testimony of Harold E. Daggett.)

waitresses serving drinks only, and then there were several seated at the bar. I stayed in there from about 8:00 o'clock until about 11:30. I bought four drinks for myself while I was in [153] there, and I played the slot machines for a while, and then I got up and left and went over and had something to eat, and I came back about 12:30 of the following morning, and I went back in there again, and the establishment was about the same only there were less people there. They seemed to have dragged out and I believe they had stopped serving food. The food waitresses were not working. And I stayed in there until about 2:00 o'clock in the morning, and I bought four more drinks of whiskey from Russell Felton.

Mr. Stepich was in a small room near there. He was in several times while I was there and in this small room. I went up to him and bought a roll of dimes and played the slot machines with them.

Q. Did you have any conversation with Mr. Felton other than just ordering drinks?

A. Well, the only thing, when he first came up, I said: "My name is Ed. What is yours, sir?" And he said: "Well, they call me Russ." Outside of that, there wasn't a great deal of conversation. He was a pretty busy man.

Q. Did you bring any liquor with you when you went into the establishment? A. No, I didn't.

Q. Had you left any there previously or had any one [154] else? A. No.

Q. Did you order from any particular bottle

(Testimony of Harold E. Daggett.)

that you selected? A. No, I didn't.

Q. What bottle was used to pour these drinks?

A. Just the bar bottle that was on the bar.

Q. And how much did you pay for each drink that you bought? A. Fifty cents.

Q. On each occasion? A. For each drink.

Q. Did you test the drinks in any way?

A. Yes. I drank them.

Q. And was there alcohol in the drink?

A. Yes, there was. There was whiskey.

Q. And how long have you been a liquor inspector? A. Twenty-five years.

Q. Have you conducted similar examinations before? A. Many many times.

Q. Are you certain that these drinks contained alcohol? A. Certain.

Q. And are you certain that the man you saw in there that evening was Mr. Stepich, and also Mr. Felton? [155] A. Yes, I am.

Q. Can you point them out to us?

A. Yes. The second one from the end this way (indicating) is Mr. Stepich, and the one on the far end here is Mr. Felton. He was the bartender, and the man over there is the one that let me in.

The Court: I do not understand the identification of the person last referred to.

Mr. Harris: I would like the witness, your Honor, to be permitted to leave the witness stand and point out the individuals.

The Court: He may do that.

The Witness: (Standing before the defendant-

(Testimony of Harold E. Daggett.)
and indicating.) This is the bartender here.

The Court: What is his name, if you know?

The Witness: Russell Felton. And this is the man that let me in the door, Mr. Stepich.

(Witness returns to the stand.)

Mr. Harris: May the record show that Mr. Daggett has resumed the witness stand, your Honor, and that there are no further questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Toulouse: [156]

Q. Mr. Daggett, you went out to the White Center Athletic Club for the purpose of determining whether or not they were selling whiskey out there?

A. Yes, sir.

Q. When you were there, during that period of six hours, I assume that that is about right, isn't it? You were there from 8:00 until 11:30 and you were there from 11:30 until——

A. From 12:30 to 2:00. I was there from 8:00 to 11:30 and went out for an hour and came back at 12:30 and was there until about 2:00.

Q. During that period of time you drank eight drinks? A. That is right.

Q. You are charged with the obligation to collect the occupation tax under Title 26, Sec. 3253 of the Act?

A. I have authority. I am charged with enforcing the Act. I have authority to collect, but I am

(Testimony of Harold E. Daggett.)

not charged as a collector. I am an investigator, criminal investigator.

Q. Will you describe to the Court what sort of a stamp tax we are herein concerned with?

A. A retail liquor dealer's tax stamp which is a receipt for money for the taxes paid as a retail liquor dealer as an occupational tax.

Q. And that occupational tax is for how much money? [157]

A. Fifty dollars.

Q. And how long is this stamp good for?

A. One year.

Q. What is the fiscal year of the stamp?

A. The fiscal year starts on July 1 and ends June 30.

Q. In other words, you were interested in finding out whether or not this \$50.00 stamp tax was posted in this establishment?

A. No, I was not, because I had already searched the records and knew that there was no tax there, and that they had not paid the tax. I had searched the records in my office and also in the Director's office in Tacoma, and knew that the taxes had not been paid on this establishment.

Q. In other words, there would have been one stamp tax due for the entire establishment?

A. Correct.

Q. Now, it is the establishment that is required to have the stamp, is that not correct?

A. That is correct.

Q. In short, if the White Center Athletic Club

(Testimony of Harold E. Daggett.)

had the one stamp, you would have twenty-five bartenders selling under that one annual stamp, is that correct? A. Correct.

Q. And it is the obligation of the establishment?

A. If it was at one place.

Q. Yes, I say at that particular place.

A. At that particular place, yes.

Q. And it is the obligation of the establishment to have that stamp, is that correct?

A. Correct.

Q. Under the law they are required to have it posted, are they not? A. That is right.

Q. Now, did you ask Mr. Felton whether or not he knew that this establishment did not have that stamp?

A. No, because I knew they didn't have that stamp.

Q. Answer my question. A. No.

Q. Did you ask Mr. Felton that question?

A. No.

Mr. Harris: I think he answered the question, your Honor, and further explained his answer.

The Court: Objection is overruled. Counsel has properly interrogated the witness up to this point in this connection now mentioned, and the objection is overruled.

Q. (By Mr. Toulouse): You have identified a Mr. Stepich? A. Yes. [159]

Q. During that period of five hours, you say that you got some coins from Mr. Stepich. Where was that? By the coin operated machines?

(Testimony of Harold E. Daggett.)

A. Where I got the coins from?

Q. Yes.

A. It was through a little window there that is at the front of the building. I think it is a Dutch door or something that goes in there, and he was back of that, and I went up there and got a roll of ten cent pieces from him.

Q. It was that portion of the club, though, devoted to coin operated machines, was it not? There were three things going on. There was a bar; there was a provending of food; and there was a section devoted to the coin operated machines?

A. No. It is all in one big room.

Q. I realize that, but there were three things going on? A. That is right.

Q. Now, did you ever see Mr. Stepich behind the bar selling or offering for sale any whiskey?

A. No, I didn't.

Q. In your investigation of this place, did you determine who owned the premises out there?

A. Yes, I did. [160]

Q. And who owned the premises?

A. I searched the records.

The Court: Please answer the question directly.

A. Peter Desimone owned them up until September of 1951, when the Brooks Realty Company acquired them.

Q. And they acquired them by virtue of a condemnation proceeding, is that correct?

A. I wouldn't know as to that. The records just show they were acquired by the Brooks Realty

(Testimony of Harold E. Daggett.)

Company on, I believe, September 18 of 1951, and that Peter Desimone had owned them since 1943.

Q. All right. Now, it is a fact, is it not, that in your examination of all the records you did not find the name of John Stepich, Harold Hopkins, Russell Felton or Bert DePierris in any way, shape, manner or form connected with any interest in the real estate or in connection with the personal property located in the White Center Athletic Club?

Mr. Harris: I object. There are two portions of that question—first of all, real estate, and then personal property. I am going to object to the question because it is compound and ask that the question be broken down.

The Court: This is an intelligent witness. The objection is overruled. [161]

A. The incorporation papers of the White Center Athletic Club show that Mr. Stepich is president and was at the time of the incorporation of the White Center Athletic Club. As far as the real estate, it showed that Peter Desimone owned the real estate from 1943 to September of 1951 when the Brooks Realty Company acquired the real estate.

The Court: Now, you haven't answered the question. He asked you with reference to these particular individuals what was the fact about ownership of the real estate, for one thing.

The Witness: As far as I know, your Honor, that is my full knowledge of what the records say as to the real estate ownership.

(Testimony of Harold E. Daggett.)

The Court: Then what do you know about personal property? Is that in the question?

Mr. Toulouse: Yes, it is.

The Witness: I know nothing about personal property.

Q. (By Mr. Toulouse): Now, you discovered, did you not, that the White Center Athletic Club was a charitable corporation formed about 1946?

A. I discovered that it was a corporation. I don't know as to the charity. It was incorporated.

Q. Did you discover that it had been dissolved?

A. As far as I know, it has never been dissolved. The records don't show that it has ever been dissolved.

Q. Do the records show the corporation taxes for the years 1947, '48, '49, '50 and '51 were not paid to the State Treasurer of the State of Washington?

A. I didn't go into that. I wouldn't know.

Q. Did you, in the course of your investigation, examine whether or not Mr. DePierris, Mr. Felton, or Mr. Hopkins was in any way connected with or an officer of or director or stockholder of the White Center Athletic Club?

A. I examined the records in the State case that showed where Mr. Hopkins had signed under oath that he was the secretary-treasurer of the White Center Athletic Club.

Q. Now, I will ask you whether or not you examined the statement of officers and directors of the White Center Athletic Club on file in the County

(Testimony of Harold E. Daggett.)

Auditor's office? A. I did.

Q. State whether or not Mr. Felton's name appeared on any of those documents. A. No.

Q. State whether or not Mr. DePierris' name appeared on any of those documents.

A. No. [163]

Q. State whether or not Mr. Hopkins' name appeared on any of those documents. A. No.

Q. State whether or not Mr. Desimone's name appeared on any of those documents. A. No.

Q. State whether or not Mr. Stepich's name appeared on any of those documents.

A. Yes, as president.

Q. And that record was in 1948, is that not correct? A. I believe that is correct.

Q. And that there is no record showing who was president for the year 1951 or 1952 or whether or not, for that matter, the corporation even had an existence, is that not correct?

A. That is correct.

Q. Now, your search of the records disclosed that the Brooks Realty Company owned the real estate from June of the year 1951 until July 1, 1952?

A. September 18, 1951.

Q. From September 18, 1951?

A. That is right.

Q. Until this date, as far as you know?

A. As far as I know.

Q. Now, did you examine the Brooks Realty Company [164] papers? A. I tried to.

Q. You tried to? I will ask you this: Did you

(Testimony of Harold E. Daggett.)

find Mr. DePierris' name in connection with the Brooks Realty Company? A. No.

Q. As an officer, director or stockholder?

A. No.

Q. Did you find Mr. Felton's name as an officer, director or stockholder? A. No.

Q. Did you find Mr. Stepich's name as an officer, director or stockholder? A. No.

Q. Did you find Mr. Desimone's name as an officers, director or stockholder? A. No, sir.

Q. Did you find Mr. Hopkins' name as an officer, director or stockholder? A. No.

Q. Now, from September of 1951, did you make any determination from the record as to who was the lessee of the premises known as the White Center Athletic Club and owned by the Brooks Realty Company?

A. I couldn't find any Brooks Realty Company. I [165] tried but I couldn't find any Brooks Realty Company.

Q. Did you find a lease to one Tom Maloney?

A. No, sir.

Q. Did you find any evidence of any lease upon the part of any one of these defendants of those premises? A. No, sir.

Q. Or any lease upon the part of the White Center Athletic Club, Inc., this charitable corporation? A. No, sir.

Mr. Harris: I object to that question, your Honor. As yet we have no evidence that the White

(Testimony of Harold E. Daggett.)

Center Athletic Club, Inc., is a charitable organization, so I object to the form of the question.

Mr. Toulouse: I think he has testified to the fact. He has testified to it.

The Court: You asked him the question a few minutes ago about whether or not——

Mr. Toulouse: I will ask it again.

The Court: Very well. There was some mention of the word “charitable” in the question.

Mr. Harris: And his answer to that was: “I don’t know anything about the charity part of it.”

Q. (By Mr. Toulouse): Mr. Daggett, the articles of incorporation of the White Center Athletic Club, Inc., you examined, did [166] you not?

A. I examined them as to the officers. There are two or three pages of them, and I examined them as to the officers and took all of the officers’ names and address. I didn’t examine it as to the why’s and wherefore’s of its inception.

Mr. Toulouse: That is all for myself. Mr. Spiller has some questions.

Mr. Spiller: May I question the witness?

The Court: No. The Court does not approve of that.

Mr. Spiller: Will the Court indulge me then when I ask them through Mr. Toulouse?

The Court: You may consult with Mr. Toulouse and if Mr. Toulouse wishes to ask other questions, he may do that.

(Mr. Spiller consults with Mr. Toulouse.)

(Testimony of Harold E. Daggett.)

Q. (By Mr. Toulouse): How long have you known Pete Desimone?

A. Oh, 25 years I guess, pretty close to it. I knew him when he first opened up the Fiesta Club out at 85th and Greenwood. That was right after liquor came in. He had an establishment out there. I have known him off and on since then.

Q. How long prior to May 6, 1952, did you know that [167] Pete Desimone operated the White Center Athletic Club?

Mr. Harris: I am going to object to that.

The Court: You may ask him if he knew how long prior to that date he operated it.

Q. (By Mr. Toulouse): Did you know that Mr. Pete Desimone operated the White Center Athletic Club?

A. Only hearsay. I didn't know. I have never seen Mr. Desimone there or Mr. Desimone has never told me that he operated it.

Q. What was your object in going out there on May 6?

A. To determine whether liquor was being sold there or not—if they were carrying on the business of a retail liquor dealer.

The Court: A few moments are indulged for final conference between co-counsel, after which I wish Mr. Toulouse, if he has any further questions, to go ahead and ask them without a conference every time a question is asked.

(Conference between Mr. Toulouse and Mr. Spiller.)

(Testimony of Harold E. Daggett.)

Q. (By Mr. Toulouse): Mr. Daggett, you testified that you picked a name off a storefront in White Center and told Charlotte Fulford, a person who was later identified as Charlotte Fulford, that you were a friend of that particular business [168] man, is that correct? A. Correct.

Q. Now, what did you next do? You are in the cloak room, are you not?

A. No. I am in the entrance hall.

Q. What did you do then?

A. When I first went in, I just tossed my hat on the counter and started as if I was going in, and she said: "Just a minute. Are you a member here?" And I said: "No, but I am going to meet a member here." And she said: "Who is the member? Who were you going to meet here?" And I gave her a name, and she said: "Well, wait a minute." And I stood there and she went back out into the other room and came back with Mr. Stepich.

Q. Now, when you say she went into the other room, what room is that?

A. Well, there is a connecting, in the main room, there is a connecting door between the cloak room and the main barroom.

Q. Can you see the main room from the cloak room? A. Yes.

Q. Now, what took place after Mr. Stepich came out? Could you see where he came from?

A. No, sir.

Q. He came from the area where the patrons

(Testimony of Harold E. Daggett.)

were [169] either eating or sitting at the bar?

A. That is right, sir.

Q. Now, what took place then?

A. Mr. Stepich asked me again who I wanted to see and I give him this name agin.

Q. He asked you this in the cloak room?

A. He was in the cloak room. I was in the entrance hall.

Q. Was Charlotte Fulford with him?

A. That is right.

Q. Standing with him? A. Yes.

Q. They were behind the counter? A. Yes.

Q. And you were on the other side of the counter in the cloak room? A. That is right.

Q. At this point can you see the interior of the barroom? A. I couldn't at that point.

Q. You couldn't see it?

A. No. I was standing back a little bit.

Q. What took place next?

A. He asked me about this name that I had given him and then he left and went back towards the door [170] to the other place, and when he came back, he said: "He isn't here. He isn't in there."

Q. Did he say anything else?

A. He repeated the name two or three times before he went back, and then he said: "Oh, yes, I remember him. I'll see if he is here." And he came back out and said: "He isn't here," And I asked him: "Well, could I use your phone?" And he said: "Yes. It is on the wall there." And I went over.

(Testimony of Harold E. Daggett.)

Q. Where was the phone located?

A. The phone was over to the right of the cloak room on the wall, just to the left of the entrance door.

Q. Was it a pay phone or a private phone?

A. A pay phone.

Q. As you go to the phone, where is Mr. Stepich?

A. He is in the cloak room.

Q. How far is that from the phone?

A. A matter of fifteen feet I would say.

Q. He is not within earshot of your using the phone? A. No.

Q. Can he see you? A. Yes.

Q. What happens next?

A. After I got through using the phone——

Q. Who did you call? [171]

A. I called my boss, Mr. Sides, and told him I was out at the White Center Athletic Club trying to get in.

Q. Where did you find Mr. Sides?

A. At home.

The Court: I have asked counsel to avoid further interruptions of each other. If it occurs again, I will have to terminate the cross-examination.

Q. (By Mr. Toulouse): Now, Mr. Stepich did not hear whom you called or hear your conversation? A. No.

Q. Is it a closed phone booth? A. No.

Q. And what did you do next?

A. I just turned to Mr. Stepich and said——

(Testimony of Harold E. Daggett.)

Q. It is 15 feet away. You didn't turn to him. You walked up to him.

A. No. I just turned around, about 15 feet away, and I said: "Well, it is O.K. He said he would be over right away." I turned around towards the door to go in there, and he stood there for a minute or two and then he said: "O.K." and the door clicked and I pushed it open and went in.

Q. Where did Mr. Stepich go?

A. He was in the cloak room when I went [172] in.

Q. Where did he go after you went in the back room when the door clicked?

A. I haven't any idea.

Q. Where was Mr. Stepich standing when the door clicked?

A. He was standing back of the bench—like that is in the cloak room. He was standing in the cloak room.

Q. Was Charlotte Fulford there?

A. That is right.

Q. Did Mr. Stepich have his hat on?

A. No.

Q. When was the next time that you saw Mr. Stepich after you entered the back room?

A. Oh, it wasn't so very long after that that he walked out into the barroom and——

Q. How long after?

A. Oh, not more than five minutes.

Q. Where were you?

A. I was sitting at the bar having a drink.

(Testimony of Harold E. Daggett.)

Q. Where did he go?

A. He just seemed to wander around through there. He didn't seem to have any particular aim. He just walked around and walked back.

Q. How long did you watch him?

A. Oh, a minute or two. [173]

Q. And you never saw him the remainder of the evening?

A. Yes. I saw him back of this—I went up and bought some dimes off him to play the slot machines.

Q. How long a period of time did you observe him paying out on the coin-operated machines?

A. Well, the fact of the matter is I didn't know he was there until I asked the bartender for some dimes, and he said: "You get your dimes over there. Go over there and they will give you some change." And I went over to where he pointed, over to that window, and Mr. Stepich was there, and I got a roll of dimes from him.

Q. And that is the only other time that you saw Mr. Stepich?

A. That is right.

Q. While you were in the club?

A. That is right. Outside of the fact of seeing him come out into the club room and go back in there, why, I didn't see him.

Q. Did you make any arrests that night?

A. No, I didn't.

Q. Did you advise Mr. Stepich that there was no Federal stamp at that establishment?

A. No, I didn't.

Mr. Toulouse: That is all.

Mr. Harris: That is all. [174]

The Court: That is all. You may step down.

(Witness excused.)

The Court: At this time the Court will be at recess for about ten minutes.

(Recess.)

The Court: All are present as before the recess. You may resume the interrogation.

Mr. Spiller: If the Court please, the defense has asked the witness Booth to remain in attendance, and there is no further need for him.

The Court: Do you wish to excuse him?

Mr. Harris: Yes, your Honor.

The Court: Mr. Booth, you are excused and need not remain longer in attendance at this trial.

Mr. Harris: At this time, your Honor, the Government would just like to refresh its recollection as to the exhibits. May I compare my records with those of the Court and Clerk?

The Court: You may.

Mr. Harris: Plaintiff's Exhibits 1, 2, 4, 5 and 6 have been admitted in evidence.

The Clerk: That is right, according to my records.

The Court: That is right. I would like to state this reminder as to No. 2, that it was for the limited purpose stated. [175]

Mr. Harris: Yes, your Honor, likewise No. 1.

The Court: Limited as stated at the time?

Mr. Harris: Yes, your Honor.

The Court: Exhibit No. 3 has been identified, but my records show it has not been admitted.

Mr. Harris: That is right.

With that understanding, the Government rests.

The Court: Is there anything further to be done with respect to No. 3?

Mr. Harris: No, your Honor.

The Court: The defendants may now proceed.

Mr. Toulouse: At this time, if it please the Court, the defendants renew their motion to strike Plaintiff's Exhibit 1 for the limited purpose for which it was offered, on the ground, first, that it is incompetent. It is incompetent because there is no showing, and there is nothing in the evidence to show that the defendant Harold Y. Hopkins is the same Harold Y. Hopkins who signed the jurat in Exhibit 1, and even assuming that there was some evidence that Harold Y. Hopkins is the same Harold Y. Hopkins that signed the jurat in Plaintiff's Exhibit 1, as to the defendants Stepich, Desimone, Felton, and DePierris, that out-of-court declaration of Hopkins would be irrelevant, immaterial and hearsay as to such defendants. Furthermore, that it would be irrelevant and immaterial [176] to prove, assuming that it was properly identified and established as being the signature or the jurat of one of these defendants on trial, to establish this subject matter of the jurat. In short, it would not be the best evidence as to whether or not the self-serving declarant Harold Y. Hopkins declared in the jurat was the secretary-treasurer of the White Center Athletic Club, a corporation, or was not the

secretary-treasurer of the White Center Athletic Club, a corporation, and that in any event the declaration therein contained would not be binding upon the officers or upon the corporation or upon any of the defendants not present at the time of the making of the declaration, assuming that it was made by one of the defendants on trial herein.

The Court: I wish to hear from Mr. Harris in response to this objection.

Mr. Harris: Yes, your Honor. May I call your Honor's attention to the date that the declaration was made, the 29th day of March, 1952. The Government suggests that the motion should be denied and resists such motion to strike on the basis that this was during the period alleged in the indictment concerning which a conspiracy is alleged to have existed. This is a declaration of a co-conspirator as to his position in the club, the White Center Athletic Club. Whether the club was in [177] fact in existence is not material, because that issue is not on trial. The issue is whether or not he held himself out or ever declared or made any suggestion as to any position that he held. If he made that statement during the period in which this conspiracy exists, and if the Court finds there was such a conspiracy, then the statements made by him, even though made out of the presence of the other co-conspirators, are binding as far as the over-all picture of the conspiracy is concerned.

The Court: What is the limitation as you understand it and intended to make it on your offer of this Exhibit 1?

Mr. Harris: Merely, your Honor, that Harold Y. Hopkins who signed that verification, jurat as counsel has chosen to call it, at that time and during the period covered in the indictment held himself out to be the secretary-treasurer of the White Center Athletic Club, a corporation.

The Court: Did you offer it limited as to evidence on that fact as to whether or not he was then or held himself out to be such a corporate officer?

Mr. Harris: Yes, your Honor.

The Court: The objection is overruled.

The Court will apply to the Court as the [178] fact-finder in this case the same cautionary instruction which the Court has given in almost every jury-tried conspiracy case.

Mr. Toulouse: The defendants likewise move to strike Plaintiff's Exhibit 2 on the ground that it is incompetent, irrelevant and immaterial and, furthermore, that as to the defendants DePierris, Felton, Desimone and Hopkins, that the same is hearsay.

Defendant—rather, Plaintiff's Exhibit 2 is incompetent for the reason that it establishes nothing. It establishes that an application for a certificate of registration was made by a corporation purporting to be the White Center Athletic Club. It is purportedly signed by John F. Stepich. There is no evidence in the record to identify the John F. Stepich therein referred to as the John F. Stepich before this Court as a defendant. There is no evidence to support the proposition that John F. Stepich, that that is his signature. There is no evidence that the White Center Athletic Club author-

ized Mr. John F. Stepich to make the application. There is no evidence that John F. Stepich signed as president of the White Center Athletic Club or was in any way connected. On the face of the exhibit, it says "President"—you don't know of what. The date of the exhibit? It doesn't show the date that it was made. It does show apparently [179] that it was received by the Commission on November 2, 1951.

Mr. Harris: I call counsel's attention to the "Send Forms from (date) 7/1/51" filled in at the top of the right-hand corner.

Mr. Toulouse: At the top of the exhibit, as counsel has drawn to my attention, there is penciled in "7/1/51," the business classification number, all in pencil, and the file number, "C578-2851." Now, who may have made or put those dates upon there, we do not know. Who may have sent this to the State of Washington we do not know. Whether or not this is the same document that was originally sent to the State of Washington—you will recall Mr. Montante's testimony that it was not in his exclusive custody and control for the entire period of time; that it was merely in that particular jacket. I also recall that Mr. Montante did not know whether or not that was the signature of Mr. Stepich or whether or not, for that matter, that application was used for any other purpose than to issue a retail sales tax number.

I again submit that it is incompetent for the reasons that I have given; that it is hearsay as to all of the other defendants; that it is completely

incompetent as to the defendant Stepich in the absence of any identification to show that he sent it, to show that that is his signature, to show that he concurred in pushing this [180] application, or that the White Center Athletic Club authorized him to do it or that in fact it was the White Center Athletic Club that did the fact.

The same thing is true with respect to the returns which apparently are signed—this one dated July and August, 1951, apparently received by the Department on November 5, 1951, and signed by Peter Desimone. The return merely shows that there was retailing carried on at a business known as the White Center Athletic Club in a given sum of money, and that a retail sales tax was paid, and that a tax on coin-operated mechanical devices was paid on a certain tax number. There is no showing that it is Mr. Desimone's signature. It is incompetent, irrelevant and immaterial and hearsay as to the defendants Felton, DePierris, Stepich and Hopkins. There is no showing that Mr. Peter Desimone was authorized by the White Center Athletic Club or any of these defendants to make the returns, assuming he did make the return, and there is no evidence, of course, that he did make the return. For that reason, the second page of the exhibit I move that the same be stricken.

The third page of the exhibit, appearing to be an excise return dated November 8, 1951, received November 25, 1951, signed "Harold Y. Hopkins, Secretary, by White Center Athletic Club, Inc.," apparently is a return for [181] retail sales tax.

There is no showing that Mr. Hopkins signed the exhibit. It is hearsay as to the defendants Felton, DePierris, Desimone and Stepich. There is no showing that Mr. Hopkins had authority to act on behalf of the White Center Athletic Club, a corporation, or that he did in fact act on behalf of the White Center Athletic Club, a corporation, or that in fact this return is applicable to the same White Center Athletic Club that is referred to in the indictment. There is no showing who did the typing or who authorized the figures and the typing appearing upon the exhibit, and the same thing is true of the others.

The same subject matter that I have just stated with respect to Harold Y. Hopkins on the preceding page is likewise applicable to the next page of the exhibit, and the same thing is true of the next page of the exhibit which is likewise signed "Harold Y. Hopkins" and referring to January and February retail sales tax returns, and I repeat that as to the last two pages it is hearsay as to the defendants Desimone, DePierris, Felton and Stepich. There is no showing of any authority of Hopkins or that in fact he was the secretary, or is there any showing that the exhibit is a genuine exhibit made by the White Center Athletic Club or for that matter made by any of the defendants on trial here. [182]

The Court: Mr. Harris, do you wish to respond?

Mr. Harris: Your Honor, the testimony as to Plaintiff's Exhibit 2 I think can be viewed and summed up altogether as this: That they have been testified to as being the official records of the Wash-

ington State Tax Department. They have been brought here and identified as such. The purpose of the declaration is to show, as to each, who has signed the same and his official connection with the White Center Athletic Club, Inc., which has been identified here as being operated at 9616-17th S.W., Seattle, Washington, and, of course, with testimony received as to the official capacity in which each of these serve, and I refer to Federal Criminal Rule 27, that official records may be proven in the same manner as in civil actions, and I believe in this case they have been properly identified and properly accepted into evidence for the weight that your Honor sees fit to attach to each.

The Court: This motion is denied. I wish, in connection with the Court's ruling upon this motion to strike Exhibit 2 and the prior motion to strike Exhibit 1, to state that the common design, purpose, agreement and cooperation among the participants are the essence of the conspiracy. To prove that a conspiracy existed and was in operation, it is not necessary that two or more persons entered into a written or express agreement or made any [183] formal declaration acknowledging membership in the conspiracy, but it is necessary, and also proper, to prove by competent evidence beyond a reasonable doubt that they knowingly and intentionally cooperated in the furtherance of a common unlawful plan previously formed.

Conspiracy may exist either to do something unlawful or do a lawful thing in an unlawful way.

On the question of whether the alleged conspiracy

existed as charged, I, as the fact-trier, may not consider any statements made or acts done by any defendant in furtherance of the alleged conspiracy in the absence of other defendants, except against the individual making the statement or doing the acts, unless I am convinced as the fact-trier by the evidence beyond a reasonable doubt that the defendant so making such statements or doing such acts was authorized by another or other of the defendants to make those statements or do those acts in the furtherance of the alleged conspiracy and in such cases it is appropriate for me, as the fact-trier, to consider such evidence only against the defendant actually making the statements or doing the acts and such other defendants as I shall be convinced by the evidence beyond a reasonable doubt, if I am so convinced, authorized the making of such statements or the doing of such acts. [184]

However, where an unlawful object is sought to be effected and two or more persons actuated by a common purpose, pursuing a preconceived plan to accomplish that purpose, act or work together in any manner in furtherance of the unlawful scheme, each party consciously participating therein is a party to the conspiracy, no matter what part he has in the execution of the object or plan, and if two or more persons are proven to have combined together for the same illegal purpose, any act done by one of the parties in the furtherance of the original concerted plan and with reference to the common object is, in contemplation of law, the act of all of those parties.

Likewise, if a conspiracy has been established by the evidence beyond a reasonable doubt, every one of the conspirators is bound by the declarations and acts of the co-conspirators in furtherance of the conspiracy, and under those circumstances the acts and statements of one done and made in the furtherance of the conspiracy are the statements and acts of all the persons who are members of the conspiracy.

Those principles just stated have to be applied by me to these exhibits and all other evidence in the case as of the time of the close of all the evidence, that offered by the plaintiff in chief and on rebuttal, if any, [185] and that offered by the defendant at any and all times during the trial.

Now is there anything else you wish to say by way of motion?

Mr. Toulouse: Yes, your Honor. I except to your Honor's ruling with respect to Exhibits 1 and 2.

The Court: The exception is allowed.

Mr. Toulouse: I likewise move to strike Plaintiff's Exhibit 4, which appears to be a W-2 return for the year 1951, the first page thereof, having some typing on it and not signed by anyone. The date is not quite legible, but it appears to be January 31, 1952, on the ground that it is a self-serving declaration of somebody. There is no evidence to establish that any one of these defendants was connected with, made, or knew of the making or authorized the making of the first page, and so, therefore, it is absolutely incompetent.

The Court: Mr. Harris, what have you to say in that connection?

Mr. Harris: Other than that it was just the official record, your Honor. Just a minute. I thought it was the same number——

The Court: Do you recall any proof by the witness identifying that Exhibit 4 that those papers were supplied to his department by any one of these defendants? [186]

Mr. Harris: Well, you see counsel has taken the first page unit of Plaintiff's Exhibit 4 and right now I am trying to see if there is a corresponding number which would make that material to the other pages, but in view of the statement of counsel and to discourage any further argument on that particular page as to Plaintiff's Exhibit 4—there was no objection at the time—but if they now wish to strike it, I think that might possibly be well taken.

The Court: Do your remarks and motions with respect to Exhibit 4 apply to anything other than the blue-colored sheet?

Mr. Toulouse: Yes, your Honor.

The Court: Then make your statement complete as to each and all parts of that exhibit.

Mr. Toulouse: With respect to the second page, it just merely is an adding machine calculation made by somebody—I don't know who. With respect to the third page, it appears to be an employer's quarterly return, the typing on it saying "White Center Athletic Club, Inc.," dated September 30, 1951, and apparently signed by one purport-

ing to be John Stepich, president, showing W-2 taxes withheld. I object to that on the ground there is no evidence in this record, particularly from the testimony of Mr. Burdick himself to show other than the fact that one [187] year and a half ago he came to a certain office in the Internal Revenue Department and opened up a jacket known as the White Center Athletic Club jacket, under a certain number, and that he pulled this particular paper out of it. There is no showing that Mr. Stepich signed this or that any one of these defendants signed it. There is no showing that the White Center Athletic Club signed it or authorized any person to sign it on its behalf. Mr. Burdick specifically stated that he didn't know who sent it in, how it was received, who prepared it, or anything else in connection with it other than the fact that he had it, that it was in a jacket.

Now, the same thing is true with respect to the next page——

Mr. Harris: May we stipulate that is page 4 you are now referring to?

Mr. Toulouse: It is item 4 in the exhibit, which apparently is a mimeographed form filled in with dates, reciting October 31, 1951, and saying "lack of funds at due date. John F. Stepich, Pres." He doesn't say he is president of what. It doesn't show that this John F. Stepich in this courtroom signed this exhibit or that he had authority to sign it on behalf of any corporation known as the White Center Athletic Club, Inc., [188] or that he had authority from any one of the defendants, that is Felton,

DePierris, Desimone or Hopkins, to sign it, or that he had authority from any officer, director or stockholder of the Athletic Club.

With respect to item 5, it appears on that that "Harold Hopkins, Secretary," signed it. There is typed in—by whom we do not know—"White Center Athletic Club." There is no showing that Harold Hopkins, who is a defendant in this action, signed it, that he signed it in a corporate capacity for any corporation as secretary, or that he was in fact secretary, and there is no evidence to show that with respect to the defendants Felton, DePierris, Desimone and Stepich, he was authorized to sign it on their behalf, or authorized to sign it on behalf of the White Center Athletic Club, or by any of its stockholders, officers or directors.

I submit that Plaintiff's Exhibit 4 proves nothing with respect to any one of these defendants, that the only evidence is that this man Burdick had it in a file in the Internal Revenue Department, and that it has not been sufficiently identified or connected with any of the defendants in this trial.

The Court: What have you to say, Mr. Harris?

Mr. Harris: As to Plaintiff's Exhibit 4, the first item as counsel states and the second item, [189] which contains some bookkeeping or adding machine notations, I have no objection to deleting them from the original exhibit in its present form.

The Court: The Court will later ask the Clerk's assistance in that connection, but now there are three other separate pieces of paper in that exhibit, are there not?

Mr. Harris: Yes. As to those three other pieces of paper, which are the last three, Mr. Burdick testified that these are the official records. The arguments previously advanced in opposition to striking Plaintiff's Exhibits 1 and 2 are now advanced at this time without the necessity of repeating the same. As to what might be classified as item 4, Mr. Burdick's testimony was that that was received with item 3 as one particular entire transaction received from the White Center Athletic Club which bears the same address and with Mr. Stepich holding himself out again as president.

The Court: I wish you would cite some Federal law relating to this matter, Mr. Harris.

Mr. Harris: These being the official records, they can come into evidence for such weight as may be given to them by the trier of the fact, and I recite Federal Criminal Rule 27 which says that the official records may be identified into evidence in the same manner [190] as the civil rules provide, which is set forth in Title 28, U.S.C. §1732 and §1733.

The Court: Let me see about this. Sec. 1732 says:

“In any court of the United States * * *, any writing or record, whether in the form of an entry in a book or otherwise * * *”

I assume you claim this is an official record of the Bureau?

Mr. Harris: Yes, your Honor.

The Court (Continuing):

“* * * made as a memorandum or record of any act, transaction, occurrence, or event, shall

be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

“All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility. [191]

“The term ‘business,’ as used in this section, includes business, profession, occupation, and calling of every kind.”

Now, if you are proceeding under §1732, it is the first paragraph thereof which is important, which says:

“* * * if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record * * *.”

What is the proof on those two conditions here?

Mr. Harris: That I asked Mr. Burdick if these were the official records. I asked if they were kept in the ordinary course of business and under his supervision, and did he bring them from that position to the courtroom here today.

The Court: I understood that he knew nothing about the making of them. All he knew about them

was that he found them there when he took charge of the files.

Mr. Harris: Found them in the official records.

The Court: He knows nothing about whether or not they were made in the regular course of business of the Internal Revenue office. He made no statement about that, did he?

Mr. Harris: Yes, your Honor. [192]

The Court: About the records being made in the course of business?

Mr. Harris: That these were kept in the regular course of business.

The Court: That is not enough. There are two conditions here:

“* * * if made in the regular course of any business, and if it was the regular course of such business to make such memorandum * * *”

and you have no proof of that that I recall from Mr. Burdick. All he testified to was:

“These are the official records that came into my possession. All I know about them is I found these things in an official file.”

He has not proved anything about those two conditions I have just mentioned, how they were made and what they were made for.

Mr. Harris: He was not present, your Honor, when they were received.

The Court: I do not doubt that, but that does not do away with the requirements of the statute. I think probably he stated every material fact that he was able to do in his testimony, but if that is

what you are relying on, §1732, I say that that does not authorize their admission, but I wish you to consider, each [193] counsel, other sections which I will call to your attention and then, finally, the rule itself.

Sec. 1733 provides:

“Books or records of account or minutes of proceedings of any department or agency * * *”

and there is no proceeding of any department or agency here in question, is there?

Mr. Harris: I thought we had one. I thought the books and records of the Internal Revenue——

The Court: Well, if it is arguable that they are records of proceedings of the Internal Revenue, then it might come under that if the Court takes that view. (Continuing):

“* * * shall be admissible to prove the act, transaction or occurrence * * *.”

That means in the department or agency making the record. There is nothing at issue here about what act took place in the department, is there, or in the agency?

Mr. Harris: The record, that is the only thing.

The Court: Well, insofar as 1733 is concerned, that is concerned with the records of a government agency made as to proceedings in that agency. As I understood, the former position of the Government was, as to these component parts of Plaintiff's Exhibit 4, that they are offered to show acts of one or more of these defendants and [194] not acts of

the Internal Revenue Department. That is the point I am making.

“Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence * * *.”

Now, that is all that 1733 says.

Now, there are other sections. There is another in §661 (a) of 28 U.S.C. It is something that has been enacted by Congress subsequent to 1950, and I do not have it here. Does anyone have available the present §661 (a) of Title 28?

Mr. Spiller: We don't have the title here, if the Court please.

The Court: Mr. Bailiff, will you please ask Mr. Eaton to bring me the current, in effect today, §661 (a), Title 28, U.S.C.?

Now, then, in the meantime, while that is being done, do you have Federal Rules of Civil Procedure 44?

Mr. Spiller: Civil or criminal, your Honor?

The Court: Civil. Did Mr. Harris read a statement in the law that referred to the applicability of civil rules on this question to a criminal case? I have here Rule 44, “Proof of Official Record.”

“An official record or any entry therein, when [195] admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody.”

Now, he supplied oral testimony. This looks as if it refers to written certificates made in the absence of the trial proceeding. That is the way it looks to me, but if there is some part of it that applies, I will hear counsel's statement on it. Did you cite another rule?

Mr. Harris: That was Rule 27 of the Federal Rules of Civil Procedure, your Honor, that only states that the Rules of Civil Procedure shall govern.

The Court: All right. That is one rule. Have you another one?

Mr. Harris: No, your Honor.

The Court: Have you a copy of Rule 44 before you?

Mr. Harris: No, I have not.

Mr. Spiller: I have, if the Court please.

The Court: Let Mr. Harris see it.

(Mr. Spiller hands volume to Mr. Harris.)

Mr. Harris: These are the Rules of Criminal Procedure, your Honor.

The Court: I wish you to see Rule 44 of the Civil [196] Rules. Does anyone have that?

(No answer.)

The Court: Then look at my copy.

(Court hands volume to the Clerk, who gives it to counsel.)

The Court: I think there ought to be some proof here that shows that these papers emanated from

the White Center Athletic Club in West Seattle, which is the subject of this indictment. Just to get a file from the Internal Revenue Office which concerns some showing of that name or identity without having anyone here testify to its being identified with this particular one, I have some doubt about the propriety of such a procedure, also the fairness of it, and it is difficult for me to accept that proposal.

Is there anything else you want to show?

Mr. Harris: Well, I would like your Honor to reserve your ruling if you could at this time.

The Court: The Court will do that. There is one other section I wish we could see, and that is §661 (a). It is something that has been passed by Congress or by the rule-makers subsequent to 1950. Will both counsel go in chambers and see if you can assist Mr. Eaton in finding that section?

(At this time counsel leave the courtroom and there is a short recess.) [197]

Mr. Harris: I don't find 661 (a) in Title 28, your Honor. The cumulative supplement for 1953 doesn't disclose it, either.

The Court: I have a belief that there was at one time in existence a §661 (a) which bore on this subject. I have that impression, but of course my recollection, like anyone else's, could be inaccurate in this respect. I will reserve ruling on this. Was there anything else?

Mr. Toulouse: Yes, your Honor. The defendants move that Plaintiff's Exhibit 5 be stricken on the

ground that it is incompetent, in the first instance, it being shown as a printed form showing White Center Athletic Club, Inc., coin-operated gaming devices July 1, 1951, to June 30, 1952, apparently showing Peter Desimone as manager and vice-president, dated August 16, 1951, that being the first page. The second page is some penciled transcript, nothing in the evidence to show who prepared this penciled transcript or that it is signed by anyone or that it purports to be signed by anyone. The third page dated 8/16/51 and dated September 1, 1951, being a special tax return printed "White Center Athletic Club." My objection goes to this. Mr. Burdick testified that he found this in the jacket. There is no showing in the evidence that Mr. Desimone made this return, signed this [198] return, or that any of the defendants DePierris, Felton, Stepich or Hopkins authorized him to sign the return, that it was done with their knowledge, with their permission, or in their presence, or that it was done by the White Center Athletic Club, or that Mr. Desimone had any connection with the White Center Athletic Club as an officer, director, or stockholder, or that this signature appearing thereon is that of the Mr. Desimone who is a defendant in this case, or that this document was transmitted—first, who was it prepared by? There is no evidence as to who prepared it. Secondly, there is no evidence who sent it. Thirdly, there is no evidence who signed it. Fourthly, there is no evidence who put it in the jacket. Fifthly, it is only evidence, if at all, of the fact that the Government

had in its jacket three pieces of paper marked Plaintiff's Exhibit 5.

The Court: Is there anything in the papers themselves now comprising that Exhibit No. 5 which identifies the business with this particular one here? Could anyone look at this exhibit and determine that it was the business that has here been at issue in West Seattle?

Mr. Toulouse: If one accepted the truth of the printing "White Center Athletic Club, Inc.," and the address in the printing, "9616 - 17th S.W., Seattle."

The Court: That would be some evidence [199] to indicate the affirmative answer to the Court's question.

Mr. Toulouse: Yes. Of course, it would be my position, your Honor, that that has no relevancy at all with reference to whether or not there is a White Center Athletic Club, Inc., or that in fact this is a return of that particular corporation.

The Court: Does that conclude your remarks?

Mr. Toulouse: That concludes my remarks with reference to Plaintiff's Exhibit 5.

The Court: I wish to hear Mr. Harris' response.

Mr. Harris: Plaintiff's Exhibit 5, your Honor, has been kept as a part of the official records of the U. S. Internal Revenue Bureau, that the name of the establishment is White Center Athletic Club, Inc.; that the business address is 9616 - 17th Avenue S.W., Seattle. The signature is Peter Desimone. The date is 8/16/51.

The Court: That is during the period alleged here of the existence of the conspiracy?

Mr. Harris: That is right, your Honor. Under the signature is the designation of Mr. Desimone as manager and vice-president above the words "State whether individual owner, member of firm, or if officer of corporation, give title."

The Court: The Court's question is answered. Does that apply to any other papers? What about other [200] component parts of that exhibit?

Mr. Harris: Yes, your Honor. The second component part is merely a transcript of the account named "White Center Athletic Club," same address, and is not in any way identified to any person.

The third item of Plaintiff's Exhibit 5 is similar in most respects to the first item of Plaintiff's Exhibit 5, bearing the same signature, the same place, the same address, the same date, and the same capacity.

The Court: Are there only three parts?

Mr. Harris: Three component parts.

The Court: The objections and motions as to Plaintiff's Exhibit 5 are overruled and denied.

Is there anything else?

Mr. Toulouse: I except to the Court's ruling.

The Court: It is allowed.

I will wish you to be brief now because the Court will take the noon recess.

Mr. Toulouse: That is all that I have to offer with respect to my motions. Let the record show that I except to each of the rulings of the Court

with respect to denial of the motions to strike from the evidence Plaintiff's Exhibits 1, 2, 4 and 5.

The Court: The exceptions noted by counsel to the Court's ruling are allowed, but the Court has reserved [201] ruling on the defendants' motion as to Plaintiff's Exhibit 4.

Mr. Toulouse: Your Honor, there is one thought that I would like to leave with the Court with respect to each of these exhibits on the question of competency. There is no showing from any testimony as to any one of the exhibits that would preclude this situation.

The Court: Mr. Toulouse, I am not willing to and find it not convenient to indulge any further time for argument. The Court is satisfied with the rulings made, and no amount of argument can cause me to change in a conspiracy case. We are dealing with conspiracy cases often, and we may have made some mistakes. If so, they were unintentional, and as applied to the present case, they would be unintentional now, but in the light of the Court's past experience in conspiracy cases I am familiar with the argument, and I do not feel that it should cause the Court to change the rulings announced.

I wish counsel during the noon hour would give further consideration to rule or statute which bears upon this, if there is any part of it that we have not already considered. I am especially anxious to have you call that to the Court's attention which bears upon the admissibility or non-admissibility of Plaintiff's Exhibit No. 4. [202]

Mr. Harris: Yes, your Honor.

The Court: I invite your careful study of Rule 44 again, also Title 28, §1732 and §1733. I also wish you would look further to see if there was at any time in force and effect §661 (a) of Title 28, U.S.C., and what were its provisions. That is all I know of in the way of statutory or rule enactment to be considered.

Mr. Spiller: Just for the Court's information only, I have been looking through Title 28 of U.S.C. in reference to §1733 and find that §661 through §667, former title, are now included in Rule 44. That is in the historical and revision note appended to §1733. I just thought I would mention it if the Court wanted to look at it.

The Court: Do you understand from that note that even if 661 did at one time exist as a statutory provision that it has been abrogated by this §1732 or §1733?

Mr. Spiller: That is my understanding, but I would like to check that during the noon hour to make certain of my conclusion on it.

The Court: The Court is now at recess until two o'clock, and all those connected with this case are excused until that time. [203]

(At 12:00 o'clock p.m. Thursday, April 22, 1954, proceedings recessed until 2:00 o'clock p.m. Thursday, April 22, 1954.)

April 22, 1954—2:00 P.M.

The Court: May the record show that each and all of the defendants are present and that their counsel are present, also Government counsel is present.

Mr. Harris: Yes, your Honor.

Mr. Toulouse: Yes, your Honor.

Mr. Spiller: The record may so show.

Mr. Harris: I believe your Honor reserved ruling as to Plaintiff's Exhibit 4. During the noon recess I attempted to secure some authority for your Honor, and I have come to the conclusion that Title 28, §1733, incorporates that section which your Honor previously made reference to as being 661 (a).

The Court: Is it repealed or restated or is it abolished?

Mr. Harris: It is restated, not abolished but restated.

The Court: What part of what section do you think carries it forward? [204]

Mr. Harris: Sec. 1733 of Title 28, in the historical notes and the revision notes and the cases that were decided prior to the 1948 enactment of this particular section of the statute, 661 (a), 665 and 695 are all mentioned.

The Court: Is it in the bound volume? I do not have the note here.

Mr. Harris: Yes, your Honor. I am not going to base my argument on that.

The Court: What part of the language in one of these sections is similar to the old?

Mr. Harris: Well, I think the effort was made, your Honor, to incorporate the various sections of the old section and combine them in one complete section, now being 1733.

The Court: You may proceed with your argument.

Mr. Harris: The case of *Lewy vs. United States*, a 7th Circuit case, decided in 1928—my only reason for referring to that is because it is referred to in a 9th Circuit case, cited therein as some authority.

The Court: Will you give the citation?

Mr. Harris: Excuse me. 29 F. (2d) 462. Having to do primarily with the subheadings 4, 5, 6, 7 and 8, it makes reference in there to the Lewy Brothers who mailed certain information to various companies through [205] the mail. The only thing that was used was letterheads of the company signed by some officer connected with the company.

The court said:

“The books were sufficiently identified and the private ledger properly admitted in evidence. There is, therefore, no point in the suggestion that the testimony of the accountant, Brown, should have been stricken from the record. His statement, taken from the books, is in no way contradicted, but the correctness of it and of the books are in some ways corroborated by the capital stock tax returns for 1924 and 1925, made over defendant’s signature and sworn to by him on behalf of Lewy Bros.”

It is respectfully submitted that the W-2 returns

in Plaintiff's Exhibit 4 are such—they are not capital stock returns——

The Court: Are they signed by anybody?

Mr. Harris: Yes, your Honor. They are over the signature, in one instance, of John Stepich and, in the other instance, Mr. Hopkins, purporting to be in one case the president and in the other case the secretary of the White Center Athletic Club, Inc. [206]

The Court: I thought in some ways they differed as to the relation of those papers to the club in White Center that is the subject of this inquiry. I thought a part of Mr. Toulouse's argument was based on that.

Mr. Harris: I am not arguing and not asking that the first two items of Plaintiff's Exhibit 4 remain in evidence.

The Court: I say that they will be excluded, and the Court makes that ruling now. The Clerk will, as soon as convenient to the Clerk, remove those two from that exhibit unless the Court otherwise directs and delete all identification marks on either one of them and substitute the same marks on some other remaining part of the exhibit.

Mr. Harris: All right. Now I am directing my remarks in my argument to the remaining parts of the exhibit which then would be pages three and four as it now is composed. This is the Employer's Quarterly Federal Tax Return, certain statements contained therein, and the signature of John F. Stepich; title, "Pres."; dated November 7, 1951, White Center Athletic Club, Inc., 9616 - 17th S.W.,

Seattle 6, Washington. Just above the place where Mr. Stepich's signature appears is:

"I declare under the penalties of [207] perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return."

Then the item four which is attached to that item I have just mentioned is an explanation of delinquency. The name: "White Center Athletic Club, Inc." The date: "Nov. 7, 1951." For comparison with the one just previously mentioned——

The Court: That is sufficient so far as that is concerned. Turn to the next one.

Mr. Harris: The next one, your Honor, which is the last one as it is now composed is in the same form as the one previously, but the name, in place of "John F. Stepich," appears "Harold Hopkins." In place of "Pres." appears the abbreviation "Sec."

The Court: What is stated with reference to on whose behalf it was made?

Mr. Harris: "White Center Athletic Club, Inc.," same address, and the same Seattle precinct number, 6, Washington.

The Court: I thought Mr. Toulouse made the point in argument that there was no such thing as that to identify it with this particular business.

Mr. Harris: That may be the first item of [208] Plaintiff's Exhibit 4 which only mentions the White Center Athletic Club, Inc., the address of the estab-

lishment, but makes no mention of any individual.

The Court: Now, will you compare the situation as to execution and identification of the persons intended to be involved in the papers in Plaintiff's Exhibit 5 with those last two papers in Plaintiff's Exhibit 4?

Mr. Harris: May I see Plaintiff's Exhibit 5, please?

The Court: Yes. The Court has already ruled upon that.

Mr. Harris: Plaintiff's Exhibit 5 contains the signature of another other than those that appear in this exhibit, so if I might see Plaintiff's Exhibits 1 and 2.

The Court: I am not making the point that I wish to see another exhibit bearing execution by these same individuals. It is not that at all, but it is the same kind of identification.

Mr. Harris: The same establishment, the White Center Athletic Club, appears in Plaintiff's Exhibit 5. The same address appears in Plaintiff's Exhibit 5.

The Court: Read the name of the person, if any, purporting to execute the document on behalf of that [209] business in No. 5.

Mr. Harris: Peter Desimone, Manager and Vice-President.

The Court: Of what?

Mr. Harris: White Center Athletic Club, Inc., 9616 - 17th S.W.

The Court: What kind of paper is that?

Mr. Harris: The Special-Tax Return.

The Court: Now, the next sheet in that exhibit.

Mr. Harris: The next sheet, your Honor, in Plaintiff's Exhibit 5, I think also has no relationship, and if counsel wishes, it may be stricken with my approval. However, the last sheet is the White Center Athletic Club, Inc., 9616 - 17th S.W., Seattle 6, Washington, signed by Peter Desimone, and the date, as manager and vice-president.

The Court: Mr. Clerk, will you step down there in the presence of counsel on both sides and take out of No. 4 the first two papers and transfer the Clerk's marks to some appropriate paper in the remaining part of the exhibit?

(The Clerk confers with counsel at the counsel table.)

The Court: Have you now done that?

Mr. Harris: Yes, your Honor. I approve of its present condition as rendered by the Clerk. [210]

The Court: I wish the Clerk to go down to counsel table with Exhibit 5 and take out the papers that Mr. Harris said could be taken out.

(The Clerk confers with counsel at the counsel table.)

The Court: I would like to ask Mr. Harris if he recalls anything in Mr. Burdick's testimony indicating whether or not Exhibits 4 and 5 came out of the same official file?

Mr. Harris: The same official file having to do with the White Center Athletic Club, Inc., located at 9616 - 17th S.W.

The Court: Did you have any reason, and if so, what, for separating the parts of the file into two exhibits?

Mr. Harris: Because, your Honor, these quarterly returns in Exhibit No. 4 consisted of these and other items that were clipped together in this short style, this small, abbreviated style to conform in size, while there were other forms similar to those in Plaintiff's Exhibit 5 which conformed to a different size but which all consisted of the official records of the White Center Athletic Club.

The Court: Do you now deny, Mr. Toulouse, that these two exhibits have in them papers which purport to be signed by one or the other of those persons whose names have been mentioned by Mr. Harris and which signatures were put on the paper on behalf of the White Center Athletic Club?

Mr. Toulouse: Yes.

The Court: Do you deny that the two exhibits contain any papers which do not have signatures on them?

Mr. Toulouse: No, your Honor.

The Court: Was there anything else you wish to say as to Plaintiff's Exhibit 4 now, Mr. Toulouse?

Mr. Toulouse: No. I have nothing to add to my other remarks, your Honor.

The Court: It seems to me that Plaintiff's Exhibits 4 and 5 each stand on the same basis as to admissibility and that each of them is shown on the record to be admissible in evidence here. All objections to each of Plaintiff's Exhibits 4 and 5 are overruled, and each of them is admitted in evidence.

The Court has previously admitted Plaintiff's Exhibits 4 and 5 and that action is now confirmed. Counsel's exceptions to the Court's rulings are allowed.

Mr. Spiller: If the Court please, solely for the advice of the Court, and I would like also for the record to show it, I think that Mr. Harris has unwittingly misread the note referring to 661. I have the history of [212] that before me, if the Court is interested in hearing it.

The Court: Well, that does not alter the Court's ruling. I mean to say it would be interesting to hear what you have to say, but have in mind that it is no longer needful. I do think you ought to be permitted to correct any erroneous statement that you think may have been made about it.

Mr. Spiller: I would like to state to the Court in the first place that former Rule 661 has not been reincorporated in present Title 28, §1732 or §1733. It was specifically and in its entirety repealed in 1948 and a new rule was stated with reference to the admissibility of certain documents.

The Court: Do you see any words or expressions in the new rule which you believe intended to carry forward into future effect any part of old 661 (a)?

Mr. Spiller: I do not, and I am prepared to show that old 661 does no longer exist and that while the Court's ruling might be right under the old 661, it can't be right under the present statute.

The Court: I will hear your further argument on it, but I think the Court is satisfied with the ruling no matter whether that particular statute

approves of it or whether the Court believes some other phase of the law does. However, I certainly shall be glad to hear [213] anything you may have to say. I like to hear from everybody who is to be heard before announcing a ruling, but since you did not understand that and the Court did not know that you were not submitting the matter on Mr. Toulouse's argument, the Court will now hear you, but try to have in mind in the future, not only in this case but in every other case, that the Court wishes to hear from everybody who is to be heard from before the Court announces its decision.

You may proceed.

Mr. Spiller: Thank you, and I will be very brief, if the Court please. I want to say first of all to the Court that the old 661 I was not able to get in its 1940 edition form because the 1940 edition of Title 28 has been removed from both the library on the ninth floor and the library on the tenth floor. Title 28 appears only in its present 1950 edition, which is after this '48 amendment. I do have 661 in its text form contained in *Greenbaum vs. United States*, 80 F. (2d) at 126.

The Court: That was an Arizona case, and the new law was passed while the Coplin case was pending in this Court while this Court was holding its sessions in the Post Office Building in the months of September or October to December—I cannot give the year.

Mr. Spiller: It was 1935. [214]

The Court: The Court received some business records in evidence, and midway in the trial the

Court thought that the ruling of the Court was erroneous and that further proof was needed. The Court struck out of the case all of those admissions and gave counsel an opportunity to again prove them. I think some of them were received finally and some were not. In connection with that case and because of the experience they had in that case, this law was changed.

Mr. Spiller: Yes. Now, I am citing at present only for the text of 661 which I can't get otherwise in the library. It is very short.

“Copies of any books, records, papers, or other documents in any of the executive departments * * * shall be admitted in evidence equally with the originals thereof, when duly authenticated under the seal of such department.”

Now, in 1948, Chap. 646 of Acts of the 80th Congress, Second Session, enacted June 25, 1948, being Chap. 115, there was a new enactment on what official records and documents, both of a private nature made in the regular course of business and of a public nature on file in various public offices, were to be admissible, and to what extent they were to be admissible, and the same act in its concluding section, being §39, provides [215] that the sections or parts thereof of the revised statutes of the District of Columbia, revised statutes of the United States or statutes at large “enumerated in the following schedules are hereby repealed” and then follows a schedule of repeals, including in 62 Statutes at Large at page 993 specifically Title 28, §661,

and I offer this not in criticism at all of the Court's ruling but for the record only.

The Court: Thank you very much.

Mr. Spiller: We submit that under the present rule none of these items should be admitted.

The Court: The objections are overruled and the action of the Court already announced will stand on these exhibits.

Is there anything else to be said?

Mr. Spiller: May we have an exception to that?

The Court: Allowed. Is there anything else to be said by plaintiff before plaintiff rests its case in chief?

Mr. Harris: No, your Honor.

The Court: Does the plaintiff now rest its case in chief?

Mr. Harris: Yes, your Honor.

The Court: The defendants may further proceed now with their case in chief or otherwise proceed in [216] accordance with the law.

Mr. Toulouse: At this time, your Honor, the defendants move that the indictment be dismissed on the grounds that there is a failure of proof to establish the essential ingredients of the conspiracy charged in this case with respect to each of the defendants.

With respect to the defendant Desimone, we submit that the evidence discloses through the witness Turner that at one time he saw Mr. Desimone behind a bar; that Mr. Desimone stated that he was selling service and that he was not selling whisky. At another time Mr. Berch D. West was in the

club, and he said that the doorman at the club talked to Mr. Desimone and that later he was admitted to the club. The other evidence is the evidence which I moved to strike, being Plaintiff's Exhibit 5 which purports to be special tax returns to the Federal Government signed, purportedly, by Peter Desimone. The only other evidence in the case with respect to Mr. Desimone is that he indicated to Mr. Turner that there were fifteen house bottles on the occasion that Mr. Turner was out there at the time of the Lions Club party in 1952. Now that is the only evidence in the case with respect to that particular defendant.

Now, analyzing the evidence with respect to that defendant and in the light of the principle that the [217] evidence with respect to any particular defendant must be considered separately with respect to such defendant and must show acts, conduct, or some other evidence that is clearly referable and points to the joining of a conspiracy or the formation of a conspiracy on or about July of 1951, the first one would indicate a substantive violation perhaps of the Steele Act. If Mr. Turner were believed that Mr. Desimone made the statement that he was selling service and not selling whisky, it is clearly not referable to the fact that Mr. Desimone made an agreement with somebody else to violate the Federal statute.

The next item of evidence, Mr. Berch D. West seeing him at the club, that act, standing alone or together with the other acts, is not referable to an agreement upon the part of all five of these indi-

viduals to evade the payment of a Federal stamp tax for one year, that is to evade the payment of \$37.50 to the Federal Government for the years 1951-52.

The coin returns, if it has any probative value, and it is my position that there is no identification whatsoever that Mr. Desimone signed it or that it was his act, even assuming that he did make the return, that evidence adds up to that Mr. Desimone paid a coin-operated gaming tax to the Federal Government on or about the date that the exhibit bears. It is referable to show that [218] he paid that tax, if the evidence is competent at all, on behalf of the White Center Athletic Club, Inc.

Now, I submit that if you take all of those facts together, add them all up, that, if it shows anything, it show that a business, to wit, a corporation, White Center Athletic Club, Inc., operated a business at that location that sold whisky, which would be a violation of the Steele Act.

The next defendant that I shall discuss the evidence with reference to is John Stepich. The only evidence in the case with reference to the defendant Stepich are the items in evidence offered by Mr. Harris. Here we have an application for a certificate of registration to be issued to the White Center Athletic Club purportedly signed by John F. Stepich, President. It recites in there:

“To sponsor, promote or engage in sporting events, shows, etc., and the training of athletes.”

It recites that the business was formerly operated by the White Center Lions Club, Inc. Apparently

on its face it is a request for a retail sales tax jacket number. Assuming that that has any probative effect, and there is no evidence at all to show that Mr. Stepich signed it in any capacity or that he caused it to be signed or that he caused it to be mailed or that he caused it to be prepared.

The next item is that in November, 1951, a [219] delinquency tax return, being Plaintiff's Exhibit 4, appears in evidence for what it is worth, "John F. Stepich, President." It doesn't say president of what. I assume that "White Center Athletic Club, Inc.," and this typing here, there is no evidence to show who did it, the Government or somebody else. There is no evidence certainly to show that Mr. Stepich or any of these defendants or that the White Center Athletic Club typed that in there.

Now, you take that item and you have the other item that he was once seen talking with Mr. Burke, the enforcement officer, at the bar. Mr. Burke candidly stated that they talked about old times when they were in the Army together, sat and drank at the bar.

The other evidence is Mr. Daggett, who says that he saw Mr. Stepich in the cloakroom out at the premises here in question, and that he next saw Mr. Stepich when he wanted some coins to play in the machine.

Now, add up each item of evidence. Certainly the exhibits with the signatures on them are not probative, in my judgment, of anything or referable to a conspiracy. If they are probative of anything, it is probative of the fact that a corporation, a White

Center Athletic Club, did business at a certain location. There is certainly no evidence before this Court that could convince one beyond a reasonable doubt that John F. [220] Stepich signed this statement or that John F. Stepich authorized it to be signed or that he was in fact president of the White Center Athletic Club or an officer, director or shareholder of the White Center Athletic Club. So I do not see any overt act or any act of a nature acting in concert. There is no connection with the sale of whisky. There is no showing that Mr. Stepich ever sold any whisky at those premises; that he ever offered to sell any whisky at those premises; or that he carried on any business at those premises, and I submit that that falls short of showing a conspiracy to violate this Federal statute.

As to the defendant Hopkins, the only items against the defendant Hopkins, the first one is found in Plaintiff's Exhibit 1 offered for the limited purpose of a jurat, and there is no evidence that Mr. Hopkins signed it. There is certainly no evidence beyond a reasonable doubt that he was the secretary of the White Center Athletic Club, Inc. Clearly his signing that could not be interpreted or referable to the fact that he agreed with one or more of the other defendants to carry on the business at the White Center Athletic Club.

The W-2 return which is the second page of Exhibit 4 stands on the same footing. There is no showing that Mr. Hopkins signed that exhibit. There is no showing [221] that Mr. Hopkins signed that exhibit. There is no showing that he was the

secretary of the White Center Athletic Club. There is no showing that he caused it to be prepared. There is no showing that it was his act that caused it to become a part of the Federal records.

The other item is the excise return which shows, on the third page of Plaintiff's Exhibit 2, the fourth page and the fifth page, purportedly the signature of Harold Y. Hopkins on an excise return to the State of Washington. There is no showing from the witness Montante that he knew that Mr. Hopkins signed the return or that Mr. Hopkins had signed the return on behalf of the White Center Athletic Club or that Mr. Hopkins was an officer, director or shareholder of the White Center Athletic Club. All Mr. Montante knew was that this was in a jacket of excise tax returns and that the State had never used the piece of paper for anything. I submit that the piece of paper doesn't prove anything, that each and every declaration therein, of course, is hearsay and certainly not proof beyond a reasonable doubt that he was connected with the White Center Athletic Club.

The only other testimony, that Mr. Nicolai said that he did not have an independent recollection as to whether or not Mr. Hopkins signed the jurat on Plaintiff's Exhibit 1. He said that he recalled meeting Mr. Hopkins [222] once. He also stated that he did not know whether or not he had received that information from some files and records that he may have had in his possession, that is as to his representative status.

The other evidence is one of the Orthopedic

Guild women who testified here. I think it was Mrs. Noble. I might be wrong. However, one of those women testified that she talked to Mr. Hopkins with respect of the Orthopedic Guild getting dinners at the location, at the White Center Athletic Club, and that he stated that she could. She asked whether or not she could buy drinks, and he stated that she could buy drinks. You recall that the witness testified that she didn't pay Mr. Hopkins and she did not testify that he was in any way in charge of the club, and she did not testify that he was in any way in a representative capacity for the club. She merely testified that he said that she could buy drinks for that particular party.

The only other evidence with respect to Mr. Hopkins is that he was seen by Mr. Turner at the time that Mr. Turner was out there in a conversation that Mr. Turner was having with one of the bartenders in the vicinity of the cloakroom.

Now, I submit that with respect to the evidence on Hopkins, taking each one of the acts, clearly the returns [223] to the Government are only referable, if they are referable at all, to show that a corporation, a White Center Athletic Club, was carrying on a business. There is no evidence to show that Mr. Hopkins ever made a sale, ever bought any whisky, ever stored any whisky. There is no evidence to show that Mr. Hopkins ever received a salary from the club, ever benefited from the sale of whisky or was in any way connected with the sale of whisky, perhaps with the exception of the

Noble woman who said that she talked to Mr. Hopkins. The place of their conversation—my notes don't show that it was established—but she talked to Mr. Hopkins and was told that she could buy dinners at 50c a plate and that she could also buy whisky.

I think that those acts, if they amount to anything, are not acts that would even constitute the substantive crime here in question. Certainly they do not rise to the dignity of showing that he had an agreement of some character with the other defendants or with some other persons unknown.

Now, with respect to the defendant Felton and the defendant DePierris, in the interests of time I will discuss them both, because I think they are on the same plane. The evidence shows that Felton was a part-time bartender. He was seen tending bar. The evidence shows [224] that DePierris was a bartender, that he, too, was tending bar. The evidence further shows that there were conversations with both of these individuals by the Washington State Liquor Board investigators with respect to did this establishment have an RLD stamp. It can be said that Berch D. West and the witness Daggett were out there and saw these people tending bar. Assuming for the moment that they have proved beyond a reasonable doubt that they were selling whisky and did in fact sell whisky and did in fact make sales at that place, it is clearly not referable to show that there was an agreement between them, a preconceived plan or design, to fail to pay the Federal tax.

Now, I say that because here is Mr. Daggett. He has been an investigator for the Federal Liquor Department for some twenty-five years. The Federal statute here in question provides for an occupation tax. The occupation tax attaches to the establishment. The tax to be paid by the establishment is to be posted in the establishment. Mr. Daggett candidly admitted—I should say Mr. Burke candidly admitted there was no question in anybody's mind that the status of these two individuals was that of bare employees. Now, bare employees certainly do not carry on a business or do business in the sense that the real party in interest, the [225] entrepreneur, carries on the business. If anything can be said with reference to Felton and DePierris, one must come to the conclusion that they were not certainly conspiring, that the testimony of the liquor investigators is in fact in October of 1951 that Felton never even knew of the existence of an RLD stamp, and that DePierris didn't even know of the existence of one until January of 1952, as to whether or not one was or was not required.

Now, to convict these two particular men of a conspiracy or to say that their conduct rises to the dignity of a conspiracy is to say that the commission of an overt act which is in itself a violation of the statute, that is the substantive offense charged, which is not charged here—the substantive offense is not charged—you have a conspiracy or an agreement to commit the substantive offense is to permit an inference from the fact that the men had made sales, to say that that and that alone, plus the

fact of their employment, is sufficient to say that they agreed with their employer to violate a Federal statute, whereas obviously, and I think in all fairness the object of the statute is to license an establishment. If the commission of the overt act constitutes a substantive offense itself, constitutes a conspiracy to commit that offense, then that is the only evidence, taking the Government's case most strongly against these two [226] particular defendants, that is clearly referable to a conspiracy. I respectfully submit, your Honor, that certainly as to the defendants Stepich, Felton, DePierris and Hopkins that there is certainly a very, very thin line as to whether or not there was a conspiracy. If there is any conspiracy, I cannot see what fact taken independently is not as consistent with a purpose to violate the Steele Act as it would be to violate the Federal statute. It is inconceivable to me that two employees for a \$37.50 stamp tax required of their employer would agree with their employer to evade the payment of that tax. The very gist of the thing is an agreement not to pay the Federal tax. That is the gist of the conspiracy herein charged.

It is likewise inconceivable to me that you can take the individual acts of John Stepich and jump from those individual acts, taking the Government's case at its best, and find that there was an agreement upon his part not to pay the Federal tax or that he joined this agreement or that he did something to further the non-payment of the tax.

The same thing is true with Mr. Hopkins.

Now, I think the evidence shows that Mr. Desimone operated his place of business, and he, and he alone, operated it. There is no evidence to show that the premises [227] were owned, operated, leased or otherwise under the control of any one of these other four individuals. I can't see anything in the evidence to show an active dominion or control. Taking another view of the evidence, one could say that the evidence could add up to show that the White Center Athletic Club, a corporation, carried on a retail liquor business, and it did not pay its tax. Now, in such event, and I submit that as to these defendants, surely as to these defendants, there is not sufficient evidence to show that they were officers, directors, stockholders or connected with the White Center Athletic Club, a corporation, which may have violated the statute, to support the proposition that there was a conspiracy.

The only concert, if it pleases the Court, that you have here is the concert in place and time. Mr. Stepich is seen there at the bar. Mr. Stepich is seen by Mr. Daggett in the coin-operated section handing out coins. The only concert that you have with respect to Mr. Felton and Mr. DePierris is that they are seen tending bar. Admittedly their status is that of employees.

I respectfully submit that as to those, particularly as to the defendant John Stepich and as to the defendants Felton and DePierris, there is no act upon their part to show that there was a conspiracy with Mr. [228] Desimone or with any other

person to violate this Federal statute. That is all, your Honor.

The Court: Does Mr. Spiller wish to add any argument?

Mr. Spiller: At this time, no.

The Court: The Court believes that the motion should be denied as to each defendant as to each and all parts of the motion. The motion is denied and the challenge is overruled.

The defendants may at this time make their opening statement of what they think the proof will be or otherwise proceed.

Mr. Spiller: If the Court please, we have a few character witnesses here that have been in attendance a long time and have other businesses. May I call them out of order?

The Court: You may do that.

Do counsel intend to waive the opening statement?

Mr. Spiller: Yes, we do.

Is Mr. Winter in the courtroom?

CASPER M. WINTER

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows: [229]

The Court: I do not know whether you have observed it, Mr. Winter, but it is difficult to hear one's voice in this room many times.

The Witness: I am a little hard of hearing.

The Court: I think probably we had better put a chair down there where everybody can hear you.

(Testimony of Casper M. Winter.)

(Witness left the stand and sat in a chair directly in front of counsel's table.)

Direct Examination

By Mr. Toulouse:

Q. Will you state your name, please?

A. Casper M. Winter.

Q. Spell it.

A. Casper, C-a-s-p-e-r M. Winter, W-i-n-t-e-r.

Q. Where do you live?

A. At 10614 First Avenue South.

Q. Is that Seattle?

A. Yes—well, outside the city.

Q. In the South End? A. Yes.

Q. Is that near White Center?

A. About five miles from White Center.

Q. How long have you lived around there? [230]

A. Well, I lived around White Center ever since 1918 up until 1930. Then I moved down to First South.

Q. What is your occupation?

A. I am a real estate broker.

Q. How long have you been such?

A. Oh, about since 1931-2.

Q. Continuously up until this time?

A. No, off and on.

Q. Are you presently engaged in that business?

A. Yes.

Q. Are you acquainted with the defendant John Stepich? A. Yes, I am.

(Testimony of Casper M. Winter.)

Q. How long have you been acquainted with him?

A. I knew him slightly around about 1946, when he was in the real estate business.

Q. He was then in the real estate business?

A. Yes.

Q. Did you know him more intimately later on?

A. Yes.

Q. When did you begin to know him more intimately? A. The last five or six years.

Q. Do you know what business he is engaged in?

A. He is an insurance broker.

Q. Do you know how long he has been so engaged?

A. 1949, I think, something like that. [231]

Q. Do you know where he is engaged in that business? A. Yes, I do.

Q. Where?

A. 98-something Delridge Way.

Q. Is that in or near White Center?

A. Well, that is in White Center, inside the city limits.

Q. Do you know what Mr. Stepich's reputation for good character and for being a good citizen is?

A. Yes, I do.

Q. Do you know what that reputation is in White Center? A. Oh, yes.

Q. For how long a period of time have you known of that reputation?

A. Well, ever since I knew him.

Q. And will you state what that reputation is?

(Testimony of Casper M. Winter.)

A. Why, it is very good.

Q. Did Mr. Stepich have an office for the transaction of an insurance business in White Center between June 30, 1951, and July of 1952, do you know?

A. Yes. He was in the insurance business then if I remember right.

Mr. Spiller: I think that is all.

The Court: You may cross-examine. [232]

Cross-Examination

By Mr. Harris:

Q. Mr. Winter, did you know that Mr. Stepich was connected with the White Center Athletic Club in any way?

A. No, I didn't know.

Mr. Harris: That is all.

The Court: You may be excused.

ROBERT BARRETT

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Spiller:

Q. Will you state your name for the record, please?

A. Robert Barrett.

Q. How do you spell your last name?

A. B-a-r-r-e-t-t.

Q. Where do you reside?

A. 1611 42nd North, Seattle, Washington.

(Testimony of Robert Barrett.)

Q. What is your occupation?

A. I am a field representative for a general agency, insurance general agency. [233]

Q. For what particular agency?

A. Groninger and Company.

Q. Is that a local agency that is local to Seattle?

A. No. We are a wholesaler of insurance.

Q. In the Seattle area?

A. Yes, general agency.

Q. How long have you been so employed?

A. With Groninger and Company for three years, and in that part of the business since 1945, September.

Q. Prior to your association with Groninger, was your experience and occupation in insurance in and about the Seattle area? A. Yes, it was.

Q. Did that also include the White Center area?

A. It did.

Q. Are you acquainted, Mr. Barrett, with Mr. Stepich? A. I am.

Q. For how long have you been acquainted with him? A. Since the fall of 1947.

Q. And has your acquaintance with him been an intimate one? A. It has.

Q. During all that period?

A. Not during all that period but, oh, since 1949. [234]

Q. Are you well acquainted in the White Center area?

A. No, I am not, only where Mr. Stepich is concerned I am.

(Testimony of Robert Barrett.)

Q. Do you have any knowledge yourself of Mr. Stepich's reputation for good character and good citizenship in the White Center area?

A. Yes, I have.

Q. Do you have such a knowledge in any Seattle area?

A. Well, as far as our office is concerned.

Q. That is among the people with whom he deals in your office?

A. Yes, that is right.

Q. By the way, how does he deal with your office?

Mr. Harris: I think that is immaterial, your Honor.

The Court: The objection is overruled. I hope you will not go too much into detail to lay the foundation. Some details are permissible, and this is one instance, but it is bordering pretty closely now on too much.

Mr. Spiller: I will withdraw the question.

Q. (By Mr. Spiller): Do you know what business Mr. Stepich is in?

A. I do.

Q. What is that business? [235]

A. Local agency in insurance.

Q. And for how long has that been?

A. Since the fall of '49, late in the fall of '49.

Q. Now, you say you have a knowledge of his reputation for good character and good citizenship at White Center?

A. Yes, I do.

Q. What is that reputation as you know it?

A. It is very good.

Mr. Spiller: You may examine.

(Testimony of Robert Barrett.)

Cross-Examination

By Mr. Harris:

Q. Do you know where Mr. Stepich lives?

A. Yes, I do.

Q. Your acquaintanceship with him, is that business or social? A. It has been both.

Q. Have you been to the White Center Athletic Club? A. I have.

Q. Were you there with Mr. Stepich?

A. I believe I was.

Q. Do you know what connection he has with it?

A. No, I don't. [236]

Q. Never discussed it? A. No.

Mr. Harris: That is all.

Mr. Spiller: That is all.

The Court: You may be excused.

(Witness excused.)

Call the next witness.

LYLE M. TINKER

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Spiller:

Q. Will you state your name for the record, please, and spell your last name?

A. Lyle M. Tinker. L-y-l-e M. T-i-n-k-e-r.

(Testimony of Lyle M. Tinker.)

Q. Where do you reside, Mr. Tinker?

A. 1117 S.W. 139th.

Q. Is that in Seattle?

A. It is between Burien and White Center. It is outside of the city limits.

Q. What is your occupation?

A. I am a supervisor for the Employment Security [237] Department of the State of Washington.

Q. How long have you been so employed?

A. Eight years.

Q. Has your home during all that time been in the vicinity that you have mentioned that it now is?

A. Well, within four or five miles, yes, within a radius of four or five miles. I have moved about five times but it has always been in that area.

Q. Are you a member of the Lions Club at White Center?

A. I am the president at the present time.

Q. How long have you known the defendant, John Stepich?

A. About five and a half years or six years or something of that nature.

Q. In what way did you know him, socially or in business?

A. Well, socially and business in the Lions Club, and very personally, too.

Q. Do you know what his reputation for good character and good citizenship is in the White Center area?

A. I would say it was excellent.

(Testimony of Lyle M. Tinker.)

Q. And you know that is his reputation amongst his fellows there? A. Yes. [238]

Mr. Spiller: I think that is all. You may examine.

Mr. Harris: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Spiller: If the Court please, I think that will be all of the character witnesses for Mr. Stepich, and I am afraid I have made a mistake. I could have asked Mr. Tinker as to Mr. Hopkins, also, and I would like to recall him.

The Court: You may recall him.

Mr. Spiller: Mr. Tinker, would you resume the stand?

(Mr. Tinker resumes the stand.)

Further Direct Examination

By Mr. Spiller:

Q. You are the same Mr. Tinker who has just testified as to the character of Mr. Stepich?

A. Yes, sir.

Q. Mr. Tinker, are you acquainted with the defendant Mr. Hopkins? A. Yes, sir. [239]

Q. How long have you known him?

A. About five and a half or six years.

Q. Do you know what his occupation is at the present time?

A. He operates a fish market.

(Testimony of Lyle M. Tinker.)

Q. At White Center? A. Yes.

Q. Does he also belong to your Lions Club?

A. Yes.

Q. At White Center? A. Yes.

Q. Do you know what his reputation for good character and good citizenship is in his community?

A. It is very good.

Q. You know his reputation?

A. Yes, I do.

Q. What is your testimony as to what his reputation is? A. I think it is excellent.

Mr. Spiller: That is all, sir.

Cross-Examination

By Mr. Harris:

Q. Mr. Tinker, have you seen both Mr. Stepich and [240] Mr. Hopkins at the White Center Athletic Club? A. Yes, sir.

Mr. Harris: That is all.

(Witness excused.)

BRUCE E. LAKE

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Spiller:

Q. Will you state your name for the record?

A. Bruce E. Lake.

(Testimony of Bruce E. Lake.)

Q. Where do you reside, Mr. Lake?

A. My home address is 4026 52nd S.W., Seattle.

Q. Is that near White Center?

A. Well, it is in the West Seattle area, probably four miles from White Center.

Q. Mr. Lake, what is your occupation?

A. I am a refrigeration service engineer.

Q. Are you acquainted in White Center?

A. Yes.

Q. Do you know the defendant Harold Hopkins?

A. Yes, I do. [241]

Q. Approximately how long have you known him?

A. Approximately six years.

Q. Do you know what his occupation is?

A. He operates a fish market at 9837 16th S.W., Seattle.

Q. Do you know what his reputation for good character and good citizenship is in the community in which he lives?

A. Very good.

Q. You do know what his reputation is?

A. I do.

Q. Will you state what it is?

A. It is very good.

The Court: Which one of the defendants is that?

Mr. Spiller: Mr. Hopkins.

You may examine.

Cross-Examination

By Mr. Harris:

Q. Have you ever been in the White Center Athletic Club?

A. Yes, sir.

(Testimony of Bruce E. Lake.)

Q. Have you ever seen Mr. Hopkins there?

A. Yes. [242]

Q. Did you drink liquor there?

A. I drank liquor there, yes.

Mr. Harris: That is all.

(Witness excused.)

Mr. Spiller: Mr. Berg.

PETER N. BERG

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Spiller:

Q. Will you please state your name for the record? A. Peter N. Berg. B-e-r-g.

Q. Where do you reside?

A. 8711 40th S.W., West Seattle.

Q. What is your occupation, Mr. Berg?

A. I am store manager right now.

Q. For what?

A. Crenshaw & Bloxom. The store is in White Center. It is commonly known as the Reliable Market.

Q. How long have you been so occupied?

A. Oh, I have been there for about a year.

Q. Were you acquainted in the White Center area [243] prior to the time you came to that store?

A. Yes, many years.

(Testimony of Peter N. Berg.)

Q. Do you know the defendant Harold Hopkins?

A. Very well.

Q. For how long have you known him?

A. I first met him in 1946.

Q. Do you know what his reputation is in the community in which he lives?

A. Very good, very good.

Q. Do you know what his reputation is?

A. Yes, I do know what it is.

Q. Now, will you state what it is?

A. Very good.

Mr. Spiller: Thank you. That is all.

Cross-Examination

By Mr. Harris:

Q. Mr. Berg, did you know that Mr. Hopkins was connected with the White Center Athletic Club?

A. No, I did not.

Mr. Harris: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Spiller: I will call Mr. Felton. [244]

RUSSELL FELTON

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Spiller:

Q. Will you state your name for the record, please? A. Russell Felton.

(Testimony of Russell Felton.)

Q. And you are one of the defendants in this case? A. Yes.

Q. Where do you live?

A. 8652 17th Avenue S.W., Seattle.

Q. Is that in the White Center area?

A. Yes. It is about four blocks from White Center.

Q. Are you married? A. Yes.

Q. Do you have any children?

A. Two boys.

Q. How old are they?

A. Six and eleven.

Q. How long have you lived in White Center?

A. Since 1934.

Q. What is your occupation?

A. I am a bartender.

Q. How long have you been a bartender? [245]

A. Since 1950.

Q. May I ask you how did you learn that trade? Was it in a bartending school or by working in bars?

A. I applied for a job and I lied to the man. I told him I could tend bar. I had never tended bar before and he gave me the job.

Q. That was the first time that you tended bar?

A. Yes.

Q. How long ago was that? A. 1950.

Q. Are you acquainted with the defendant Peter Desimone? A. Yes.

Q. When did you become acquainted with him?

(Testimony of Russell Felton.)

A. Well, I have known of Pete Desimone since 1935-36. I knew him to see him in the street. I wasn't acquainted with him.

Q. Well, that is what I want to know. When did you become acquainted with him?

A. To be personal with him was in 1951.

Q. And how did you become acquainted with him?

A. He asked me to tend bar for him.

Q. When in 1951 was that?

A. It was some time in June.

Q. Independent of anything that he had said to you, [246] did you know that he had a bar in White Center at the time of that conversation?

A. Yes.

Q. What happened as a result of his asking you to go to work for him as a bartender?

A. I started to work for him within a day or two.

Q. Upon what terms did you work for him? What were the terms of your employment as to salary, as to when you would work, as to whether you would work?

A. Well, I explained to him I had to go clear with the union. So the following day I went to the union to clear with them, and they explained to me that they couldn't okay me to go to work for them for the simple reason that at that time the bottle clubs were in debate in Superior Court, as to whether they were illegal or legal, but they told me to go ahead on my own hook.

(Testimony of Russell Felton.)

Q. That is without union membership, you mean?

A. Right.

The Court: At this point we will take about a ten minute recess.

(Recess.)

The Court: All are present as before the recess. You may proceed.

Q. (By Mr. Spiller): Mr. Felton, I believe I had just asked you whether [247] at the time Mr. Desimone asked you to tend bar, whether there was any arrangement with respect to your reimbursement or your time of work, et cetera.

A. We made the agreement that I would receive union scale if I put in an eight-hour shift.

Q. I don't recall now whether you stated at what time of the year that was.

A. I believe it was in June some time. I can't recall the exact date.

Q. Of 1951? A. Right.

Q. Now, did you then go to work for Mr. Desimone?

A. I think it was two or three days after he had asked me to tend bar.

Q. Did you then go to work for him?

A. Yes.

Q. And where did you work?

A. Behind the bar in the White Center Athletic Club.

Q. Were you at that time engaged in a regular shift employment with Mr. Desimone at that place?

(Testimony of Russell Felton.)

A. No. You couldn't call it regular, no.

Q. How were your hours determined—or your shifts?

A. Well, it depended on the dinner party to be had. Saturday night—the dinner party—for instance, I would come to work at nine o'clock at night. Maybe if it [248] was Tuesday night, I would come to work at six o'clock at night. I could never determine my hours from one day to the next.

Q. Who would tell you what your hours would be, your hours of employment as a bartender at the White Center Athletic Club?

A. In most cases it was Pete Desimone.

Q. And how many shifts in a week would you work?

A. Oh, it would go four or five nights a week.

Q. Did you have any other employment during that period of time?

A. Not in 1951 after June.

Q. Was there a regular time for paying you for your services as a bartender? Was there a regular pay day?

A. Yes.

Q. On what day was that?

A. Well, that would usually come up Monday afternoon because I knew Pete would be there and he would pay me.

Q. For how long a period of time then did you work on that basis at the White Center Athletic Club?

A. It was about two weeks before Christmas in 1951 that I quit working for him.

(Testimony of Russell Felton.)

Q. Was there any special reason for quitting working?

A. Well, the Liquor Board raided the place and that had a little bit of influence on it I think. [249]

Q. Did you quit then or were you fired?

A. I quit.

Q. Did you again after that go back to work at the White Center Athletic Club?

A. Well, as part time, off and on for maybe six or seven, maybe ten, shifts, short hour shifts.

Q. During and in what year was that?

A. Well, it started some time in March of '52 and ended in the early part of May of '52, those few shifts that I worked.

Q. You say there would be about ten?

A. Well, I wouldn't say exactly. It could be anywhere from five to ten shifts.

The Court: In what month did it end?

The Witness: Ending definitely in May.

Q. (By Mr. Spiller): When you say a shift, what part of a day or of a night or of a period of time would a shift usually involve?

A. Anywheres from four to eight hours.

Q. And usually in the evening, some time between the dinner hour and midnight? A. Yes.

Q. Sometimes past midnight?

A. Yes, that is right. [250]

Q. Were you paid by the day or by the hour when you worked?

A. If I worked short hours I was paid by the

(Testimony of Russell Felton.)

hour, and if I worked an eight-hour shift, I was paid by the shift.

Q. How did you happen to terminate your employment in May of 1952? A. I was fired.

Q. By whom? A. Pete Desimone.

Q. Now, during the period that you worked there in 1951, did you know the defendant John Stepich?

A. I got to know him during that period.

Q. Did Mr. Stepich ever give you any direction as to your duties as a bartender? A. No.

Q. I am speaking now of the period in 1951?

A. No, he never did.

Q. Did you know at that time whether or not Mr. Stepich had any interest in or any connection with the White Center Athletic Club? A. No.

Q. Or whether he had any interest in or connection with the business that was conducted by the White Center Athletic Club? [251]

A. No.

Q. I am going to ask you, with reference to the period that you worked in 1952, were you ever given any directions in the conduct of your work by Mr. Stepich? A. No.

Q. To your knowledge, during the time that you were employed in 1952 there, did you know whether or not Mr. Stepich had any connection with or interest in either the White Center Athletic Club or the business that went on there? A. No.

Q. By whom were you paid your salary or your pay check? A. Pete Desimone.

(Testimony of Russell Felton.)

Q. In all cases? A. Yes, sir.

Q. Did you know by whom purchases of supplies, food stuffs, mixes, things of that sort were made for the club?

A. I was never there in that time of day when they purchased anything.

Q. Did you ever have any remuneration other than the salary or pay for your hours of work or your shifts of work at the White Center Athletic Club? A. No. [252]

Q. I will ask you that same question—either in money or in merchandise or in any kind of property?

A. No. I received my wages and that was it.

Q. In the time that you worked, either in 1951 or in 1952, did you ever see Mr. Stepich doing any work of any sort in or about the White Center Athletic Club that could be said to be connected with the business that went on there? A. No.

Q. Were there slot machines in the club?

A. In 1951 I remember there was. I can't recall if there were in '52 or not in the few shifts I worked there; I can't say.

Q. Was there a change-maker on duty at the club in connection with the slot machine business?

A. Yes, they had one in the office. The girl ran it.

Q. And who was the girl? A. Charlotte.

Q. Charlotte who? A. Fulford.

The Court: How do you spell the last name?

Q. Can you spell her last name?

(Testimony of Russell Felton.)

A. I am not sure.

Mr. Spiller: I think for the record it has been spelled F-u-l-f-o-r-d. Is that correct, Mr. Harris?

Mr. Harris: That is my recollection.

Q. (By Mr. Spiller): Did you ever at any time see Mr. Stepich in the office where change was made?

A. No.

Q. In all the time that you worked there?

A. That is right. I never seen him in the office.

Q. Now, during the time that you worked there, you became acquainted with the defendant Harold Hopkins?

A. Well, I knew him to see him before that but I became acquainted with him in the time I worked there.

Q. Did Mr. Hopkins ever give you any directions as to how to conduct your business there at the club?

A. No.

Q. Either in '51 or in '52?

A. No.

Q. Did you know of your own knowledge whether or not either Mr. Hopkins or Mr. Stepich had any interest in the White Center Athletic Club or in the business that was engaged in there?

A. No.

The Court: The way the question is put and the answer, I am not certain whether he is saying he is without knowledge or making a statement regarding a fact. [254]

Q. (By Mr. Spiller): Mr. Felton, will you clarify that answer by indicating—

A. The only knowledge I had that Mr. Hopkins

(Testimony of Russell Felton.)

or Mr. Stepich—the only time I had anything to do with them in the bar, they were customers. That is my only contact with them in the White Center Athletic Club.

Q. Did you in any way treat them any differently from any other customers?

A. Just like anybody else that would sit down at the bar.

Q. Did you look on them as co-owners or cooperators of the club or the business? A. No, sir.

Q. When you first went to work, as you have testified, for Mr. Desimone at the club, did you have any information as to whether or not there was a Federal retail liquor dealer's stamp for the operation of the business at the club? A. No.

Q. Did you ever ask anyone? A. No.

Q. Did any one ever tell you that there was or was not at the time you went to work?

A. No. [255]

Q. By the way, at that time you had been tending bar for some period of time. How long was it?

A. Before I went to work for Mr. Desimone?

Q. Yes. A. About a year and a half.

Q. Was that ever in a place where whiskey or spiritous liquor was served, as distinguished from a place where beer and wine was served?

A. No. It was a beer tavern where I worked before I went to work for Mr. Desimone.

Q. Had you ever sold whiskey at a bar prior to working for Mr. Desimone? A. No.

Q. I will ask you whether or not you had any

(Testimony of Russell Felton.)

knowledge of your own at the time you went to work for Mr. Desimone as to any Federal law requiring a place of that sort to have a Federal retail liquor dealer's stamp? A. No.

Q. Did you have such knowledge or did you not have such knowledge?

Mr. Harris: When?

Mr. Spiller: At the time that he went to work for Mr. Desimone.

A. No.

Mr. Spiller: I am not sure that we have an [256] intelligible answer in the record and it may be because of my question.

Q. (By Mr. Spiller): Did you know that there was a Federal law requiring a retail liquor dealer's stamp for a whiskey sale or operation?

A. No.

Q. You did not know that there was such a requirement? A. Not Federal, no.

Q. I will ask you when you first learned, and from what source, that there might have been such a law or a legal requirement?

A. Well, in October when the Liquor Board raided the club, Mr. Turner mentioned to me about a stamp. At the time he was explaining to me about this stamp I still didn't understand what kind of a stamp he meant. I knew it was something that should have been there. I assumed it was when he started explaining to me about the stamp, but in reality I didn't realize what the stamp was or what it was for.

(Testimony of Russell Felton.)

Q. When then did you first find out?

A. When I was charged with this indictment.

Q. Had any one in the meantime, any State officer, talked to you about a Federal liquor stamp other than in [257] October of 1951, do you recall?

A. I can't recall if they did or not. That is a State officer, you are asking about?

Q. Yes.

A. No. I can't recall if they did or not.

Q. Would it refresh your recollection any if I asked if there was a possibility that Mr. Turner could have talked to you about such a stamp during March, April or May of 1952?

A. Well, I talked to Mr. Turner in one of those months. I really don't recall what month, and whether we discussed about this tax stamp again that time or not I don't know. I can't remember if we did or not, but I remember in October is when he mentioned it to me, is when I remember he brought it up.

Q. Mr. Felton, have you ever been an officer, a director or a stockholder in the White Center Athletic Club, Inc.? A. No.

Q. Were you ever approached by any one with a request to become an officer, a director or a stockholder? A. No.

Q. Did you have any agreement, directly or indirectly, with Mr. Desimone other than your agreement to work as a bartender as you have described? [258] A. No.

Q. Did you ever have a conversation with Mr.

(Testimony of Russell Felton.)

Desimone looking to any joint action or any concerted action between you and Mr. Desimone in connection with the operation of the White Center Athletic Club or the business that there went on?

A. I don't quite understand the way you put that question.

The Court: He means any action in association of any kind with Mr. Desimone other than the employment association you have mentioned.

A. No, no.

Q. Did you have any such association or an agreement for such association with Mr. Hopkins?

A. No.

Q. Touching the operation of the White Center Athletic Club or the business that was there carried on?

A. No.

Q. Did you have any agreement for an association of any sort with Mr. Stepich touching the operation of the White Center Athletic Club or the business that was there carried on?

A. No.

Q. Did you have any agreement with Mr. DePierris respecting a joint association or a joint operation of [259] the White Center Athletic Club or the business that was there carried on?

A. There were two bars, a service bar here and one here, and if we both happened to be working that night, I would ask him which bar he wanted to work. That was it.

The Court: To whom do you refer?

The Witness: Bert DePierris, the other bartender.

(Testimony of Russell Felton.)

Q. (By Mr. Spiller): Is Bert DePierris one of the defendants here? A. Yes, sir.

Q. And what was his relationship to the White Center Athletic Club, if you know?

A. From what I understood?

Q. What did he do?

A. He was a bartender, the same as I.

Q. And your testimony is that your only association with him was in respect to your and his duties at the club?

A. If we happened to be working together at the same time, yes.

Q. Was that ever in any way as a result of any association or combination between you and other people? A. No.

Q. Or was that merely in connection with your ordinary duties as a bartender? [260]

A. I didn't quite understand what you meant there. I am sorry.

Q. I want to know, Mr. Felton, whether you ever discussed with Mr. DePierris any joint action by you and him except strictly with regard to tending bar, what you and he were to do in the ordinary course of your job as a bartender and his job as a bartender?

A. No, I never discussed anything with him.

Q. Did you ever, with respect to any other person whatsoever, have any agreement for an association in connection with the operation of the White Center Athletic Club or of the business that was there carried on? A. No.

(Testimony of Russell Felton.)

Q. This Charlotte Fulford, for example?

A. No.

Q. Or with any other person whatsoever?

A. No.

Q. Mr. Felton, you were charged with possession of liquor in violation of the Steele Act in King County Justice Court as a result of one or two of the raids that have been mentioned here?

A. Yes.

Q. And did you, with respect to one such charge, plead guilty?

A. Yes, in Superior Court. [261]

Q. And were you convicted with respect to the other charge? A. Yes.

Mr. Spiller: I think that is all, if the Court please.

The Court: Mr. Harris, you may inquire.

Cross-Examination

By Mr. Harris:

Q. Mr. Felton, your duties as bartender consisted of doing what while you were there at the White Center Athletic Club during the years 1951 and 1952?

A. Go behind the bar, and when they ordered drinks, I served them.

Q. Who would order drinks?

A. Customers.

Q. And you would serve them what?

A. Well, I served them a lot of different drinks.

Q. Did you ever serve them liquor?

(Testimony of Russell Felton.)

A. Yes.

Q. Where did you get the liquor?

A. It was behind the bar.

Q. And how did that liquor get behind the bar?

A. I don't know. It was always there when I came to [262] work, what I was supposed to serve.

Q. And who told you what liquor to serve?

A. Whoever was in the office. It was usually Charlotte Fulford. If they had a dinner party for the Milk Fund, those bottles to serve the Milk Fund people were all labeled and marked. Those were the ones that I served them.

Q. Who else gave you directions as to what bottles to use? A. Pete did.

Q. Do you remember serving liquor to Mr. West?

A. Yes.

Q. And what bottle did you use there?

A. I don't recall.

Q. Did you use Mr. West's bottle?

A. I don't recall.

Q. Did he bring a bottle in with him?

A. Well, I don't remember when he came in.

Q. You never served anybody any liquor unless they brought their own bottle, is that your testimony? A. No.

Q. What is your testimony then as to that?

A. I have served drinks out there.

Q. And using any bottle whatsoever?

A. Well, it depended. If they were with [263] these dinner parties——

Q. Well, let's eliminate the dinner parties. You

(Testimony of Russell Felton.)

didn't have dinner parties every night?

A. Most of the nights I worked we did.

Q. From your June employment in 1951 to two weeks before Christmas, 1951, you had dinner parties practically every night, is that your testimony?

A. No. I didn't work every night.

Q. Well, how many nights did you work?

A. Well, maybe one week it would be three nights; maybe the next week, six nights; maybe the next week, two nights. It was never on a steady pattern. It was whenever they had arrangements for a dinner party.

Q. Oh, you only worked then on dinner party nights?

A. Once or twice I worked if the regular bartender was going to have a night off. I filled in for him.

Q. When Mr. West appeared there, was there a dinner party in progress that night?

A. I can't remember if there was or not.

Q. Do you recall when Mr. West appeared there with Mr. Whittall?

A. Yes.

Q. Was there a dinner party there in progress that night?

A. Yes. [264]

Q. And what was your purpose in asking him if he was a liquor inspector?

A. I didn't ask him. I told him.

Q. What?

A. He was a liquor inspector.

Q. Why did you tell him that?

A. He had been down to court a week before

(Testimony of Russell Felton.)

and had told the judge I had sold whiskey and the man found me guilty, so I seen him sitting at the bar again and I asked him to leave.

Q. Were those one of your duties? A. No.

Q. Then you took that upon yourself, did you?

A. As a temperamental right at that moment, yes.

Q. And as concerns Mr. Whittall?

A. No. I didn't know he was with Mr. West until he told me.

Q. Then what did you do?

A. I asked him to leave.

Q. Did he testify in court, too, against you?

A. Yes.

Q. The previous week?

A. Oh, no, today. Excuse me.

Q. Well, let's go back to whether he testified. I believe you said the previous week, didn't you?

A. No. Mr. West did, but not Mr. Whittall.

Q. Well, my question is did Mr. Whittall testify? A. No.

Q. Then why did you ask him to leave?

Mr. Spiller: He has already answered that. I object to that if the Court please.

The Court: The objection is overruled. I understand there is some lack of clarity there.

Mr. Spiller: I withdraw the objection.

Q. (By Mr. Harris): Why did you ask Mr. Whittall to leave?

A. I figured he was a friend of this Mr. West.

Q. Was that part of your duties? A. No.

(Testimony of Russell Felton.)

Q. You took that upon yourself, did you, at that time? A. At that moment, yes.

Q. Do you remember when Mr. Daggett was there? A. No, I don't recall serving him.

Q. You don't deny serving him, though, do you?

A. No, but I don't recall it.

Q. You don't know what liquor you used then to serve him, if you did serve him? A. No.

Q. And as far as you know, he didn't bring any [266] bottle into the place, did he?

A. I don't remember him being there.

Q. How much money would you charge for the drinks that you served? A. Fifty cents.

Q. I wondered if it included Scotch or some selected whiskey other than was usually being used at the bar, would there be an increase in price?

A. No. We just charged fifty cents.

Q. Did you hear Mrs. Schwier say she paid sixty-five cents for cocktails, daiquiris—I think she used that word? A. I never served her a drink.

Mr. Toulouse: Just a minute. I object to that. I don't think it was the testimony of the witness Schwier.

The Court: Now, first one counsel objects and then the other counsel objects. One counsel has interrogated this witness on direct. I think Mr. Spiller ought to attend to the questions and answers that are concerned with this witness' testimony.

Mr. Spiller: I will object to this question then, if the Court please, upon the ground that the ques-

(Testimony of Russell Felton.)

tion calls for a conclusion that isn't to be assumed. There is no testimony by Mrs. Schwier that she ever bought a daiquiri from Mr. Felton. [267]

The Court: The objection is overruled.

Q. Do you recall her testimony? That was the question. A. Yes.

Q. Did you while you worked as a bartender ever sell any daiquiris? A. Yes.

Q. What was your price that you charged?

A. Fifty cents.

Q. Not sixty-five cents? A. No, sir.

Q. Now, you were working there, were you not, when this Dr. Edward Lincoln Smith Orthopedic Guild was in progress, their party?

A. I don't recall. What was that date?

Q. On February 29, 1952, and through the early morning of March 1, 1952.

A. I can't recall if I was or not.

Q. Do you recall if you yourself, along with Mr. Pierris, were attending bar that evening.

A. It is possible, but I don't recall the date or the dinner party.

Q. And do you recall Mr. Turner testifying that he asked you where did all the liquor come from labeled [268] for the Guild, and you told him they brought it in, do you recall that?

A. I remember talking to Mr. Turner but I don't know if that is the exact date or if that is the party.

Q. You don't remember any conversation of that kind, is that correct?

(Testimony of Russell Felton.)

A. Well, I remember talking to Mr. Turner, yes, but I——

Q. What did you say to Mr. Turner? What did he say to you?

A. By golly, I can't remember.

The Court: Try to avoid such words as "by golly."

Q. Does this help refresh your recollection any—that at that time you told Mr. Turner when he asked you did you see them bring in the liquor, that your answer was "No, but I was told they did." Does that help any? A. No, sir. I can't remember.

Q. You still don't recall that conversation or that instance, is that correct? A. That is right.

Q. Do you recall the conversation that you had with Mr. Turner on April 6, 1952?

A. I can vaguely remember the conversation, not word for word. [269]

Q. Do you recall that on that day you pointed out to him twenty-two bottles of liquor and said that was the house stock? A. Yes, sir.

Q. What did you mean by "house stock"?

A. Those were the ones that I was supposed to pour out for that dinner party that was in progress.

Q. And what dinner party was in progress that evening? A. I don't know.

Q. So your definition of "house stock" is the liquor that you are supposed to pour out for a particular party, is that correct?

A. Yes, on certain nights.

Q. And in some instances does that house stock

(Testimony of Russell Felton.)

bear consecutive numbers on the stamp over the top of the lid of the bottle?

A. I don't know. I have never examined them.

Q. And you never scratched those numbers off so that they couldn't be ascertained? A. No.

Q. Do you recall the conversation you had with Mr. Turner on April 6, 1952, relative to what you said concerning Mr. Desimone and Mr. DePierris?

A. Well, I don't remember exactly word for word, [270] but I remember I was a little put out about it.

Q. What did you say?

A. I said: "They were here a little while ago, but they aren't now."

Q. That was both of those individuals?

A. Yes.

Q. Who advised you, if any one, to tell Mr. Turner that you were not selling liquor; you were merely selling service?

A. Well, part of the time I was selling service, and he asked me what I was selling, so I told him I was selling service.

Q. What were you doing the other part of the time? A. Selling whiskey.

Q. On October 26th you testified that that was the first time Mr. Turner mentioned anything to you regarding a Federal retail liquor dealer's stamp?

A. He mentioned the stamp to me, yes. That was the first time.

(Testimony of Russell Felton.)

Q. Then you say that was mentioned to you again but you don't recall when?

A. No, sir. I don't recall when.

Q. March 1st, 1952, when the Guild was there, does that assist you in any way?

A. No. [271]

Q. When he asked you again, didn't you reply then that you weren't selling liquor, that you were merely selling service? A. I don't recall.

Q. Do you deny that you did that?

A. I don't deny it, but I don't recall it.

Q. Why when you were asked then, did you ever state that?

A. Well, up until that time, that is what I thought I was selling.

Q. Then why did you, when asked for a stamp, make such a statement?

A. That is what I believed I was selling.

Q. Do you deny that Charlotte Fulford told you that the Dr. Edward Lincoln Smith Guild had brought in certain bottles and you were to use them?

A. No. That is what she told me.

Q. You did receive some instructions from her then as to what to do, is that correct?

A. As to what party to serve, what tables.

Q. And you received some instructions you say from Mr. Desimone, is that correct?

A. Well, I don't know about that particular evening, but I received instructions from him, yes.

Q. Now, you state that you have never seen Mr. [272] Stepich do any work there at the White

(Testimony of Russell Felton.)

Center Athletic Club? A. No.

Q. You heard Mr. Daggett testify here today, did you not? A. Yes.

Q. Do you deny that he asked you where he could get some dimes to play the one-armed bandits, and you told him "over there"?

A. I don't recall him ever being in the club.

Q. Do you deny it? A. Yes.

Q. How often have you seen Mr. Hopkins and Mr. Stepich in the White Center Athletic Club as customers?

A. Well, from the beginning of when I first went to work at the White Center Athletic Club. Monday nights the Lions Club would hold their dinners there, and all the members of the Lions Club would come there, and that is when I got to know them. I got used to meeting all these Lions Club members on Monday nights. They were two of the Lions Club members.

Q. Now, can you answer my question then? How often have you seen them there at the bar as customers?

A. Every Monday night that I worked there on their dinner on Monday night. Maybe once in a great while I [273] would see them in the middle of the week there.

Q. How often would that be? My question is this, Mr. Felton: How often have you seen Mr. Hopkins—take him alone—as a customer at your bar while you have been working there?

(Testimony of Russell Felton.)

A. Well, on the average, it would be every Monday night.

Q. Would that be at least fifty times?

A. That would be once a week for the period that the Lions Club held their dinners there, and when they discontinued holding their dinners there, I don't remember the date.

Q. Mr. Felton, I believe you testified that you didn't work every night of the week, isn't that correct?

A. No. If they had their dinner dates there, they used to have their meetings and dinners on Monday nights, and usually I worked that Monday night dinner of theirs, and I would see him every Monday night.

Q. Can you give us an estimate then, your best estimate, of how much you have seen him at the club?

A. I couldn't give a truthful estimate because I don't remember when they stopped having their dinners there.

Q. Do you ever recall serving them liquor?

A. On a few different occasions, yes. [274]

Q. And do you recall them paying for it?

A. Yes.

Q. And do you recall what bottle you used when you served them? A. No.

Q. And they were buying service, were they not?

A. They were buying whiskey.

The Court: Who was that?

The Witness: Stepich and Hopkins.

(Testimony of Russell Felton.)

Q. (By Mr. Harris): And do you remember, also, on April 6, 1952, when Mr. Turner and Mr. Burke arrived, along with Mr. Booth, that Charlotte Fulford was present? A. Yes.

Q. And that she attempted to calm you down or keep you quiet? A. Yes.

Q. Is that correct? A. Yes.

Q. Why were you disturbed on that particular evening?

Mr. Toulouse: I object to that as immaterial.

The Court: Overruled.

A. Mr. Turner informed me I was under arrest, and I was getting ready to go to jail with him, and I asked Charlotte if she had called the bondsman to meet me down [275] there, and she said she couldn't get any one over the phone, so I went back to take the money out of the cash register so I could bail myself out when I got to jail, and it didn't agree with her I guess. Mr. Turner stood right there and I counted out the money, cash, that I was taking so they wouldn't think I was stealing their money, and I told them I would return it and away we went.

Q. How much money did you take?

A. Two hundred and fifty dollars.

Q. And didn't you also make the statement that you felt as though you were being made the goat by Desimone and DePierris at that time?

A. In a sense, yes, and in a sense, no.

The Court: I believe the question was did you make such a statement. Read the question.

(Testimony of Russell Felton.)

(Last question read by the reporter.)

The Witness: May I explain my answer, please?

The Court: Yes, you may, but the question is whether or not you made such a statement.

A. Yes, I made the statement.

The Court: Now you can explain.

A. Well, I had come back to work just those few short shifts, and here I was. I hadn't been in the club for I don't know how many days and I come in to work this [276] dinner party, and all of a sudden Pete is gone and Bert had left a little earlier, and the Liquor Board walked in and arrested me. Well, naturally, I was excited about it, and I said: "This is it. That is the last time." That is what I meant by that statement.

The Court: Since that time what kind of work generally have you done, Mr. Felton?

The Witness: I have been working in a tavern for—it will be two years next month, in White Center.

The Court: Have you been in any trouble with the operations in that tavern so far as compliance with the laws are concerned?

A. No, sir, not one bit.

The Court: You may proceed.

Mr. Harris: That is all.

Mr. Spiller: Might I ask two more questions if the Court please?

The Court: You may do that.

(Testimony of Russell Felton.)

Redirect Examination

By Mr. Spiller:

Q. Do you have a recollection of about how much money you earned for your services as a bartender in 1951, that is at the White Center Athletic Club? [277]

Mr. Harris: I don't think that was gone into on cross-examination, your Honor.

The Court: Do you wish to open——

Mr. Spiller: Length of time and days of service.

The Court: For the sake of expediting the matter, the objection is overruled. You may answer.

Q. (By Mr. Spiller): Do you have a recollection of about how much money you earned in '51 from the White Center Athletic Club or Pete Desimone?

A. It was around one hundred dollars.

Q. In '51 or '52?

A. Oh, excuse me. In '51, I would say it would be around a thousand dollars, maybe a little less, maybe a little more.

Q. And in 1952 it would be around what?

A. Around a hundred dollars.

Q. Now, while you were working there did you have access to the office where the change was kept?

A. No.

Q. Were you permitted to go in there?

A. No.

Q. At any time for any purpose?

A. I had been in the office maybe once in the

(Testimony of Russell Felton.)

time I had worked there. I had walked back to ask Pete about [278] something—I forget what it was—but I remember I had walked back, and that was it.

Mr. Spiller: I think that is all.

ReCross-Examination

By Mr. Harris:

Q. How can you recall the amount of money that you earned in 1951 there?

A. I was looking at my income tax returns the other day.

Q. And that is your only recollection of it?

A. Yes.

Q. And your testimony is that you reported all that you earned? A. Absolutely.

Q. And included your tips and things like that?

A. Well, I would try to avoid accepting tips.

Q. When you did accept them, you didn't report those, did you? A. Well, yes.

Mr. Spiller: I object to that if the Court please. I don't think he has any right to go into the man's reporting of various income.

The Court: The objection is overruled. [279]

Q. (By Mr. Harris): Will you explain that answer?

The Court: You are talking about tips now?

Mr. Harris: Let me repeat the question.

Q. Did you report the tips that you received there? A. I did—to Bert.

Q. To whom?

(Testimony of Russell Felton.)

A. To Bert DePierris. If we did have a couple of tips, if he made a dollar, he would split it with me at the end of a shift.

Q. And would you report that on your W-2 form?

A. I would usually put them in the slot machine. No.

Q. Well, then, your answer is——?

A. On my income tax, no, I didn't.

Mr. Harris: All right. That is all.

The Court: Anything further?

Mr. Spiller: No further questions of this witness.

The Court: You may be excused.

(Witness excused.)

The Court: I think we ought to stop here until tomorrow. The Court is now adjourned until tomorrow morning at ten o'clock.

(At 4:30 o'clock p.m., Thursday, April 22, 1954, proceedings recessed until 10:00 o'clock a.m., Friday, April 23, 1954.) [280]

April 23, 1954, 10:00 A.M.

The Court: May it be stipulated that each and all of the defendants on trial in the case which was continued until this date for further trial proceedings, namely Cause No. 48570, and their counsel, as well as Government counsel, are present?

Mr. Harris: It is so stipulated.

Mr. Toulouse: Yes, your Honor.

Mr. Spiller: Yes, your Honor.

The Court: You may proceed.

Mr. Toulouse: Mr. DePierris.

BERTRAND DePIERRIS

called as a witness by and on behalf of himself as defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Toulouse:

Q. Will you state your complete name?

A. Bertrand DePierris. [281]

The Court: How do you spell it?

The Witness: Bertrand B-e-r-t-r-a-n-d Depierris
—D-e-capital P-i-e-r-r-i-s.

Q. (By Mr. Toulouse): How old are you, Mr. DePierris? A. 33.

Q. Where do you live?

A. 6534 West Hanford.

Q. Are you married? A. Yes, sir.

Q. Where is your wife employed?

A. National Bank of Commerce.

Q. And where are you employed?

A. I am unemployed at the present time.

Q. What have you been doing for a living?

A. Oh, I have been working out of the casual labor hall of the Teamsters Union.

Q. In that connection, what types of employment have you had?

A. Unloading trucks and delivery work.

(Testimony of Bertrand DePierris.)

Q. Longshoring? A. Yes.

Q. Now, prior to January of 1952 where did you live? A. Salem, Oregon.

Q. And how long had you lived there? [282]

A. Four months.

Q. And how long had you lived in Oregon prior to July of 1952? A. Four years.

Q. And what was your business there?

A. I was in the real estate business.

Q. When did you first come to Seattle?

A. About December 1, 1951.

Q. Were you in Seattle during the year January until November of 1951? A. No, sir.

Q. After you came to Seattle, what did you do for a living?

A. Worked for the White Center Athletic Club.

The Court: Mr. DePierris, when did your residence in Seattle begin?

The Witness: December, 1951.

The Court: You may inquire.

Q. (By Mr. Toulouse): When did you first go to work for the White Center Athletic Club?

A. About December 1, 1951.

Q. And who employed you?

A. Pete Desimone.

Q. And where did that employment take [283] place? A. 9616 17th S.W.

Q. And what was your job to be?

A. Tend bar.

Q. And what were your wages to be?

A. Union wages.

(Testimony of Bertrand DePierris.)

Q. Will you state whether or not that was full time employment or part-time employment?

A. Part-time employment.

Q. When you say "part-time," will you try to characterize it to the Court as to how often you were to work at the outset?

A. Well, when I worked it was generally for an eight-hour shift, but it would vary from maybe three days a week one week and the next week it might be more than that, four or five days.

Q. And how long were you so employed by the White Center Athletic Club?

A. About four months.

Q. And during that period of time how much did you earn?

A. A little over eight hundred dollars.

Q. What would be the wage per shift on an eight-hour shift?

A. At that time it was fifteen dollars.

Q. Now, prior to your coming to Seattle in December [284] of 1951, did you know Mr. Pete Desimone?

A. Yes.

Q. And what were the circumstances under which you met him?

A. I met him before the war. He had a tavern in White Center, and I worked for the Acme Beer distributors here. I met him in conjunction with selling beer.

Q. How well did you know him?

A. Casually.

Q. In other words, you were a truck driver for

(Testimony of Bertrand DePierris.)

a beer distributing firm? A. Yes, sir.

Q. That distributed beer to a tavern owned by Mr. Desimone? A. Yes.

The Court: What is the origin of the supply that you were concerned with?

The Witness: Well, I worked for a company called the Acme Beer Distributors.

The Court: Where?

The Witness: 939 First Avenue South.

The Court: Is it true that you had lived in Seattle prior to 1951?

The Witness: Yes, sir.

The Court: You may proceed. [285]

Q. (By Mr. Toulouse): When was that that you lived in Seattle? A. I was born here.

Q. When was it that you met Mr. Desimone?

A. About 1946 or 1945.

Q. Incidentally, did you go to war?

A. Yes.

Q. How long were you in the service?

A. Two years.

Q. And where was that service?

A. I was in Japan.

Q. What years did that encompass?

A. '46 to '48.

Q. What was your rank?

A. First sergeant.

Q. After coming back from war, did you live in Seattle? A. No, sir.

Q. Where did you live?

A. In Portland, Oregon.

(Testimony of Bertrand DePierris.)

Q. Did you know Mr. Stepich? A. No, sir.

Q. Let's fix a date. Did you know Mr. Stepich prior to going to work for Mr. Desimone?

A. No, sir. [286]

Q. Did you know Mr. Hopkins?

A. No, sir.

Q. Did you know Mr. Felton? A. No, sir.

Q. Now, when did you first meet Mr. Stepich?

A. About January, 1952.

Q. And in what connection did you meet him?

A. As a customer.

Q. As a customer where?

A. At the White Center Athletic Club.

Q. Did you ever see Mr. Stepich in any other capacity than as a customer at the White Center Athletic Club? A. No, sir.

Q. Did you ever see Mr. Stepich operating the change room for the coin-operated machines at the White Center Athletic Club? A. No, sir.

Q. At any time? A. No, sir.

Q. Now, on the occasions that you saw Mr. Stepich, was that the occasions referred to by Mr. Felton, that is when the Lions Club——

Mr. Harris: I think that is rather leading.

The Court: It is.

Mr. Toulouse: I think it is. [287]

The Court: You may change the question.

Q. (By Mr. Toulouse): Can you recall the particular occasions upon which Mr. Stepich would be at the White Center Athletic Club? Just answer that yes or no. A. Yes, sir.

(Testimony of Bertrand DePierris.)

Q. Now, will you state to the Court what those occasions were?

A. In connection with myself it was very spasmodically. I may have seen him once a month.

Q. Now, I will ask you did the Lions Club at White Center hold their dinners there?

A. Yes, sir.

Q. Was Mr. Stepich a Lions Club member?

A. By hearsay only.

Q. You don't know whether or not he was?

A. No.

Q. Now, what was your rank in the Army?

A. First sergeant.

Q. During the period after you went to work for Mr. Desimone what work did you do at the White Center Athletic Club?

A. Just the usual duties of a bar tender.

Q. Did you ever make out any social security forms for Mr. Desimone? [288]

A. No.

Q. Did you ever pay any person around the club?

A. No.

Q. Did you ever do any bookkeeping for the club?

A. No.

Q. Did you ever order any food, provender or merchandise for the club?

A. No.

Q. Who paid you?

A. I was paid by two different people, Pete Desimone sometimes and a woman named Charlotte Fulford.

The Court: Did you understand she was Miss or Mrs. Fulford?

(Testimony of Bertrand DePierris.)

The Witness: She is Mrs. Fulford.

The Court: You may inquire.

Q. Did you own any of the property in that club during the period December '51 to May of '52?

A. No.

Q. Have you ever been an officer, a director or a stockholder of the White Center Athletic Club, Inc., a corporation? A. No.

Q. Have you ever been present at any meeting or purported meeting of any officers, directors or stockholders of the White Center Athletic Club, Inc., a corporation? [289] A. No.

Q. Did you at any time ever have an agreement with Mr. Pete Desimone not to pay the retail liquor dealer's stamp provided by Federal statute?

A. No.

Mr. Harris: That is leading, too, your Honor.

The Court: The objection is overruled.

A. No, I did not.

Q. Did you ever have an agreement with Mr. Hopkins wherein you and Mr. Hopkins agreed not to pay the retail liquor dealer's stamp tax under the statute at the White Center Athletic Club?

A. No.

Q. Did you ever have an agreement with Mr. Felton with respect to the same subject matter as I have stated to you in my preceding question?

A. No.

Q. Did you ever have such an agreement with Mr. Stepich as I stated in my preceding question?

A. No.

(Testimony of Bertrand DePierris.)

Q. Did you ever have an agreement with Mrs. Charlotte Fulford? A. No.

Q. Did you ever have an agreement with any one to the effect that you would agree with them not to pay the [290] retail liquor dealer's stamp tax on the sale of liquor at the White Center Athletic Club? A. No.

Q. Did you ever hear of the existence of such an agreement between Mr. Felton, Mr. Stepich, Mr. Hopkins or Mr. Desimone or Charlotte Fulford?

A. No.

Q. Did you ever hear that there was an agreement between any persons with respect to that subject matter? A. No.

Q. Did you ever go into Pete Desimone's office at the White Center Athletic Club? A. Once.

Q. And what was that occasion?

A. One night he was absent, and there was a coat that a customer had left on the premises, and Mrs. Fulford was on the telephone at the time. It was a week day. And she motioned me to go into the office to get the coat.

Q. Did you have any directions with respect to whether or not you could go into the office or could not go into the office?

A. I wasn't allowed to enter the office.

Q. Did you have any directions as to whether or not you could or could not tend the cashier's cage on the coin-operated machines? [291]

A. I was not allowed there.

(Testimony of Bertrand DePierris.)

Q. Did you have access to the books and records of the White Center Athletic Club?

A. No.

Q. Have you ever seen any books and records of the White Center Athletic Club? A. No.

Q. You were, were you not, convicted under the Steele Act for bar tending at the White Center Athletic Club? A. Yes.

Q. When was the last time that you worked at the White Center Athletic Club?

A. To the best of my memory, it was in April of 1952.

Q. And from that employment where did you go? A. I was employed by the A & B Tavern.

The Court: When and where was that?

The Witness: What was in approximately May of 1952 until December of 1952.

Q. (By Mr. Toulouse): Where is that located?

A. It is about 9600 16th Avenue S.W.

Q. Did that establishment sell spiritous liquors in any form? [292] A. No.

Q. And from that employment where did you go?

A. I went to work for the Pacific Coast Casket Company.

Q. Where is that located?

A. On Third Avenue West in Seattle.

Q. Where did you go from that employment?

A. I have been working mostly out of the Teamsters casual labor hall since then.

Mr. Toulouse: That is all, Mr. DePierris.

(Testimony of Bertrand DePierris.)

Cross-Examination

By Mr. Harris:

Q. Had you tended bar before December, 1951?

A. I was married to a woman in Portland, Oregon, that had a tavern and I helped.

Q. Is that your present wife?

A. No. It was the next wife.

Q. And the experience then that you did have at that time was not in spiritous liquor but in beer dispensing, was it? A. Yes, sir.

Q. And that is all, just beer? A. Yes, sir.

Q. And then when you came to the White Center [293] Athletic Club in December of 1951, you dispensed spiritous liquor or bar-tended spiritous liquor? A. Yes.

Q. Now, you heard Mr. Felton's testimony, did you not, concerning the liquor dispensing at the White Center Athletic Club? A. Yes, sir.

Q. Would your testimony in substance be any different than his as to what you did there?

A. No, sir.

Q. And the price you charged was the same, fifty cents? A. Yes, sir.

Q. Now, when you went to work in December of 1951, you worked for the union rate, did you not?

A. Yes, sir.

Q. Were you a member of the union, however, at that time? A. No.

Q. Who were the members or the stockholders

(Testimony of Bertrand DePierris.)

or the officers of the White Center Athletic Club, if you know?

A. I know the members, and I know the person that owns it. That confused me a little bit because it includes almost two questions.

Q. All right. Let me ask you this question then. [294] Counsel asked you I believe if you knew any of the officers at the White Center Athletic Club. I am asking——

A. I wasn't aware that there were any officers outside of one.

Q. And that one that you knew of was Pete Desimone? A. Yes, sir.

Q. But you didn't know whether it was a corporation or not, did you?

A. On my withholding slip, my W-2 form, it was listed as the White Center Athletic Club, Incorporated.

Q. Therefore, you did have some indication or some suspicion that it was a corporation?

Mr. Toulouse: I object to that, your Honor, the form of the question.

The Court: The objection is overruled.

Q. (By Mr. Harris): But you did not know who the officers of that corporation were?

A. No, sir.

Q. So far as you know John Stepich could have been an officer of the White Center Athletic Club, is that correct? A. Yes, sir.

Q. And so could Harold Hopkins? [295]

A. Yes, sir.

(Testimony of Bertrand DePierris.)

Q. As well as Pete Desimone? A. Yes sir.

Q. Had you ever been asked by any one during your period of employment at the White Center Athletic Club if you had a Federal retail liquor dealer's stamp or license?

A. Had I ever been asked if I had one?

Q. Yes. A. Yes.

Q. And do you recall the first instance that that was called to your attention?

A. I recall the instance. I don't recall the date.

Q. The instance then.

A. The instance was in a car of the State Liquor Control officers on a trip between the club and the County jail.

Q. And the officers with whom you had that conversation have testified here previously, have they not? A. Yes, sir.

Q. And to your recollection, was that the testimony of Mr. Booth and Mr. Burke?

A. To my knowledge, they were all there.

Q. You mean Mr. Turner as well?

A. Mr. Turner. [296]

Q. And you heard their testimony relative to that conversation, did you not? A. Yes, sir.

Q. Would your testimony in any way differ from what their recollection of the conversation was? A. A little.

Q. All right.

A. I don't recall Mr. Turner mentioning it so often. The only actual time I remember telling me about the retail liquor dealer's stamp was in the

(Testimony of Bertrand DePierris.)

car that one day. If he mentioned it other times, I don't really recall it.

Q. But outside of that, outside of the numbers of times that he may have mentioned it, do you find any variance in the conversation in your recollection of the same? A. No, sir.

Q. Now, were you present at the stag party on February 4? Were you and Mr. Desimone behind the bar? A. Yes, sir.

Q. Do you recall the conversation that was had then at that time? A. Yes, sir.

Q. You have heard the officers relate the substance of that conversation from the witness stand, have you not? [297] A. Yes, sir.

Q. And would your testimony be in variance with their testimony as to what was said by yourself and by them at that time? A. No, sir.

Q. Do you recall on that particular date, February 4, 1952, that Mr. Desimone pointed out thirteen bottles of spiritous liquor and said they were house stock? A. Yes, sir.

Q. Do you recall that your name appeared on one of the thirteen bottles as being house stock?

A. No, sir.

Q. Do you recall that Lyle Tinker's name appeared on two of the bottles? A. Yes, sir.

Q. Of the thirteen house bottles?

A. I am not sure of the number, but I am sure there was some liquor in his name there.

Q. And that was the same man who testified here as a character witness for Mr. Hopkins and I

(Testimony of Bertrand DePierris.)

think for Mr. Stepich, too? A. Yes, sir.

Q. Were you there on April 6, 1952? Can you recall the date? [298]

A. I don't recall the date.

Q. Do you remember Mr. Burke testifying that he saw you there for a moment and then he saw Felton and then he didn't see you any more?

A. Yes, sir.

Q. Does that help to refresh your recollection as to the date? A. Yes, sir.

Q. Were you there that evening?

A. Yes, sir.

Q. And then you absented yourself, is that correct?

A. There was some friends of mine out having dinner or drinks and I joined them at their table.

Mr. Harris: All right. That completes my examination.

Redirect Examination

By Mr. Toulouse:

Q. Mr. DePierris, did different members of the public keep their own bottles at the White Center Athletic Club? A. Yes, sir.

Q. And when you are talking about house bottles, what are you talking about? [299]

A. Generally like was said yesterday, the bottles that were brought in for a party or a group like, if I can give you an instance, of the Lions party. The reason that Mr. Tinker's name was on those bottles was because he brought them in, or I as-

(Testimony of Bertrand DePierris.)

sumed he brought them in, because of the party.

Q. In other words, they were the property of the Lions Club? A. It was a Lions party.

Mr. Toulouse: I see. That is all.

Mr. Harris: May I ask one more question.

Recross-Examination

By Mr. Harris:

Q. What do you mean by "house stock" then?

A. Truthfully, I refer to house stock as the bottles that were to be poured to a group. Otherwise, they were——. Well, it is hard to define. I mean if you were a customer and you come in and you have a bottle under your arm and if there were a group of people there, that would be considered a stock.

Q. Well, let's say then that Mr. Tinker brings in just two bottles of liquor with his name on it. Is that house stock then? [300] A. No.

Q. What do you call that?

A. It is Mr. Tinker's liquor.

Q. Now, if Mr. Tinker brings in two bottles and you serve that to the Lions Club, what do you call that?

A. If he was there—serve it to the Lions Club—well, I would consider it Lions' whiskey.

Q. All right. Now, if the White Center Athletic Club had some whiskey there and you used that, what would you call that?

A. I don't think it would have a particular name. I would just pour it.

(Testimony of Bertrand DePierris.)

Q. You don't call that with any particular name? A. No, sir.

Q. And in the trade they don't use the name "house stock" to your knowledge?

A. As a general rule, no, sir.

Q. Do you recall on February 4, 1952, Mr. Turner going to take a number of bottles, oh, possibly one hundred to two hundred bottles of liquor? Do you recall that?

A. Of him taking all the whiskey?

Q. Yes.

A. I don't recall the date. I recall him taking all the whiskey. [301]

Q. On February 4, 1952, the date of the stag party, when you stated previously that you recalled Mr. Desimone pointing out thirteen bottles of house stock, does that help refresh your recollection as to Mr. Turner advising Mr. Desimone that he was going to take all his liquor, consisting of a hundred or two hundred bottles?

A. I remember his saying that he was going to take them.

Q. And then do you remember Mr. Desimone saying that most of all that liquor belonged to the Lions Club who had a party there, do you recall him saying that? A. Yes, sir.

Q. And then do you recall him saying: "Take these thirteen bottles. This is house stock. The other belongs to the Lions Club." Do you recall that? A. Yes, sir.

(Testimony of Bertrand DePierris.)

Q. Now, what do you mean by house stock again?

A. You asked me before. I am not arguing with you now. You asked me before what I call house stock. If that is what he called it—he owned the place—that was probably what he meant was that if it were illegal whiskey he meant to take it, but as far as myself calling anything house stock, I have never used the phrase.

Q. And Lyle Tinker's two bottles then of house stock [302] was included in those thirteen bottles, were they not?

A. I don't know.

Q. Didn't you previously state that they were—you didn't know how many bottles but that Tinker had some there?

A. I knew he had some whiskey there.

Q. Do you now deny that his name appeared on any of the thirteen bottles that were declared house stock at that time?

A. If whiskey that he brought in was declared as house stock, I don't recall it.

Q. Do you want to change that portion of your testimony now, is that correct?

A. It is hard——

Mr. Toulouse: I think this is argumentative.

The Court: The objection is overruled.

A. It is hard for me to say honestly about that because I didn't actually look at the labels of the bottles, each bottle that was seized by Mr. Turner. There was a lot of whiskey there, and if the whiskey that was seized by Mr. Turner had Mr. Tinker's

(Testimony of Bertrand DePierris.)

name on it, I truthfully couldn't say whether I knew it or not.

Mr. Harris: That is all.

Mr. Toulouse: That is all. [303]

The Court: Step down.

(Witness excused.)

The Court: At this time we will take about a ten-minute recess.

(Recess.)

The Court: All are present as before the recess. You may now proceed.

Mr. Spiller: If the Court please, I am going to ask for the privilege of calling a couple of witnesses out of order for the reason that two of the defendants' witnesses, both of them employees at the White Center Athletic Club, have not as yet shown up, one of them because his partner has been rushed to the hospital, and I think it essential that we have that testimony. However, I would like to call several witnesses now out of order.

The Court: That will be agreeable for you to change the order if you wish, Mr. Spiller.

Mr. Spiller: I will call Mr. Kirk first.

VAL KIRK

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows: [304]

Direct Examination

By Mr. Spiller:

Q. Mr. Kirk, will you state your name for the record? A. Val Kirk.

Q. Where do you reside, Mr. Kirk?

A. Seahurst, Washington.

Q. In what vicinity is Seahurst?

A. That is out close to Three Tree Point.

Q. Adjacent to Seattle?

A. That is correct.

Q. What is your occupation, Mr. Kirk?

A. I own and operate a pharmacy.

Q. Where is your pharmacy located?

A. 13447 First Avenue South.

Q. And in what vicinity is that?

A. Well, that is about the central part of the Highline area.

Q. Is that close in any way or in the vicinity in any way of White Center?

A. Possibly about four miles.

Q. Do you know the defendant Stepich?

A. Yes, sir.

Q. How long have you known him?

A. Oh, possibly twelve years. [305]

Q. When did you first become acquainted with him?

A. I first became acquainted with John Stepich during the war. He was the first sergeant of my

(Testimony of Val Kirk.)

outfit at Fort Lewis, and then I have known him since as he resides in our area out there.

Q. In what years was your war service?

A. From May of 1941 until the end of the war, four years and ten months.

Q. And during that period of time how long did you know John Stepich?

A. For possibly two years of that period.

Q. Was that the early two years or the latter two years? A. '42 and '43, sir.

Q. Do you know what his occupation has been in the last two or three or more years?

A. Yes, sir.

Q. What is it?

A. In the insurance business.

Q. Do you know where he conducts his business?

A. Yes, in White Center. I don't know the exact address.

Q. Have you had business dealings with him?

A. Yes, sir.

Q. During all that period of time? [306]

A. Yes.

Q. That is the last three years?

A. Yes, sir.

Q. Or more? A. Yes.

Q. And what was that business?

A. He carries some of the insurance on my home, my automobiles, my business, and also my athletic insurance for my athletic teams.

Q. Are you acquainted with his reputation for good character and good citizenship in the White Center area? A. Very well, sir.

(Testimony of Val Kirk.)

Q. For how long a period of time?

A. Ever since he has lived there.

Q. And what is that reputation?

A. Very high.

Q. Does Mr. Stepich have his own office there or does he office with an insurance company in White Center?

A. Well, I may be incorrect, but it is my impression that he has his own office and has his own agency.

Mr. Spiller: That is all.

Cross-Examination

By Mr. Harris:

Q. Mr. Kirk, did you know that Mr. Stepich was [307] in any way connected with the White Center Athletic Club? A. No, sir.

Mr. Harris: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Spiller: I will call Mr. Beal.

ALBERT BEAL

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Spiller:

Q. Will you state your name for the record?

A. Albert Beal.

(Testimony of Albert Beal.)

Q. How do you spell your last name?

A. Beal—B-e-a-l.

Q. Where do you reside?

A. My residence is at 3202 Avalon Way, Seattle.

The Court: What they call West Seattle?

The Witness: Yes.

Q. Is that in the vicinity of White Center?

A. No. My business is in White Center, not my [308] residence.

Q. What is your business?

A. I am president of Center Motors, Inc.

Q. What kind of a business is that?

A. That includes automobile dealership and auto repair.

Q. Is that new and used cars?

A. New and used.

Q. What kind of cars? A. Hudsons.

Q. And how long have you been engaged in business in that occupation and in that location?

A. Since 1951.

Q. Are you acquainted with the defendant John Stepich? A. Very well.

Q. How long have you known him?

A. Since 1951.

Q. Since what time of the year in 1951?

A. I am not exactly sure. I think it was in the middle part of '51, around in June or July.

Q. And do you know what his business is?

A. Yes, sir.

Q. What is it? A. Insurance. [309]

Q. Do you have business dealings with him?

(Testimony of Albert Beal.)

A. I do, sir.

Q. Does he carry your insurance?

A. He does.

Q. Your business insurance or household?

A. Business insurance.

Q. Do you know whether or not he has an office in White Center? A. Yes, sir, he does.

Q. Where is that office with reference to your own business establishment?

A. Right directly across the street, sir.

Q. Has that been true since 1951?

A. Yes, sir, as long as I can remember.

Q. Do you have an opportunity to see or to know whether during the business day Mr. Stepich is regularly occupied in the insurance business at his place of business? A. Yes, sir, I do.

Q. Do you know what Mr. Stepich's reputation for good character and good citizenship is among the business men in the White Center area?

A. Yes, sir, I do.

Q. Do you know what his reputation for good character and good citizenship is socially in the White Center [310] area? A. Yes, sir, I do.

Q. And will you state first of all among the business men what that reputation is?

A. Mr. Stepich, among the business men, was elected I believe to the presidency——

The Court: No. I think you ought to answer the question. Read the question.

(Last question read by reporter.)

(Testimony of Albert Beal.)

A. Very good.

Q. Now, Mr. Beal, are you a member of any civic organizations at White Center of which Mr. Stepich may also be a member? A. Yes, sir.

Q. What are those organizations?

A. White Center Lions Club.

Q. And what is his reputation for good character and good citizenship in the Lions Club?

A. The best, very good.

Q. Do you have independent knowledge as to Mr. Stepich's community activities at White Center? A. Yes, sir.

Q. State very briefly for the record what they are.

Mr. Harris: I don't think that is material.

The Court: Sustained. [311]

Q. Are you acquainted with Mr. Bruce Williams?

A. Yes.

Mr. Spiller: If the Court please, I am asking this question somewhat for the information of the Court, too. Mr. Williams is one of the witnesses whom I have called.

The Court: Do you want to explain his absence?

Mr. Spiller: I want to explain his absence which I have just learned.

The Court: You may do that. Perhaps counsel might accept your statement.

Mr. Harris: I would, your Honor.

Mr. Spiller: What I have heard from the witness during the recess is that Mr. Williams, who is engaged in the gas station business at the present

(Testimony of Albert Beal.)

time and who was employed at the White Center Athletic Club during the time laid in this indictment as a bartender, has been called to his place of business because his partner who operates the gas station has been rushed to the hospital.

The Court: Well, he can be obtained in Court, and if you need the Court's assistance by any express order or subpoena, the Court will consider any application in that connection.

Mr. Spiller: That will be all, Mr. Beal.

The Court: You may examine, Mr. Harris. [312]

Cross-Examination

By Mr. Harris:

Q. Have you ever been to the White Center Athletic Club? A. Yes, sir.

Q. Drank liquor there? A. Yes, sir.

Q. Do you, of your own knowledge, know of any connection John Stepich has with that athletic club? A. No, sir.

Mr. Harris: That is all.

The Court: You may step down.

(Witness excused.)

The Court: With respect to further character testimony as far as Mr. Stepich is concerned, how many witnesses have you contemplated calling on that subject? Three is about all one should call.

Mr. Spiller: I didn't contemplate calling any more.

The Court: You may proceed.

Mr. Spiller: Mr. Berg, please.

PETER N. BERG

called as a witness by and on behalf of defendants, having been first duly sworn, [313] was examined and testified as follows:

Direct Examination

By Mr. Spiller:

Q. Will you give your name, please?

A. Peter N. Berg.

Q. What is your occupation?

A. Store manager.

The Court: May I have the spelling of your name?

The Witness: B-e-r-g.

Q. And where is the store that you manage?

A. It is in White Center at 9837 16th Avenue S.W.

Q. What is the business that is conducted in that store?

A. We have a fish market, a meat market, and a produce stand.

The Court: He was called as a character witness? Is that what you are calling him for?

Mr. Spiller: That is correct.

The Court: Go right into the material facts as quickly as you can, please, Mr. Spiller.

Q. (By Mr. Spiller): Did you during the period from June 30, 1951, until sometime in May of 1952 do business with the White Center [314] Atheletic Club? A. Yes.

Q. Will you state for the record and to the

(Testimony of Peter N. Berg.)

Court what your business transactions with the club were during that time?

A. Yes. They had dinners at the club and we supplied them with their food stuffs, vegetables, things of that nature.

Q. And with whom did you do business at the White Center Athletic Club?

A. With Mr. Desimone, the owner.

Q. Did you understand that Mr. Desimone was the owner of the business?

Mr. Harris: I will object to that, your Honor.

The Court: You may ask him who, if he knows, was the owner of the business or the operator of the business. The Court does not require you to state a question in any form specified by the Court unless the Court makes that obviously clear, but one way to ask such a question would to be ask him: State, if you know, who was the manager? That might save several questions.

Mr. Spiller: I will ask it that way then.

Q. State, if you know, who was the owner of the business at the White Center Athletic Club?

A. Yes. [315]

Q. Will you state who was the owner?

A. Mr. Desimone, Peter Desimone.

Q. Who, if you know, placed orders with you for the delivery of food stuffs at the White Center Athletic Club?

A. Well, it is usually the cook, and Mr. Desimone himself occasionally came over and made the orders directly to us at the store.

(Testimony of Peter N. Berg.)

Q. To whom, if any one—by whom were you paid for your deliveries? A. Mr. Desimone.

Q. Would there be occasions in which you would make deliveries and Mr. Desimone was not there?

A. Oh, yes. Quite often he was not there.

Q. Would you attempt to collect for your produce from any one else?

A. No, no. We would let it ride on the books until the next order, and then we would collect for both of them at once, at a time when he would be there.

Mr. Spiller: I think that is all.

Cross-Examination

By Mr. Harris:

Q. How did you make your bills out? What title did [316] you use? A. Reliable Market.

The Court: You mean with respect to the purchaser?

Mr. Harris: Yes.

A. Just White Center Athletic Club.

Q. Did you know it was a corporation?

A. No, sir.

Q. You never made your bill out to the White Center Athletic Club, Inc.?

A. Never. We just used the letters of White Center Athletic Club.

Q. Now, how did you know Pete Desimone owned the club?

A. I just took it for granted. He ran it and he was the boss.

(Testimony of Peter N. Berg.)

Q. Did you ever go over there?

A. Oh, yes, quite often.

Q. Drank liquor there?

A. Oh, yes, you bet.

Mr. Harris: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Spiller: If the Court please, I had arranged early this morning to have two very important witnesses here, one of them, Mrs. Charlotte Fulford of whom [317] we have heard, and the other would be the gentleman that Mr. Beal mentioned who was also an employee during the period of time here. I am embarrassed by the fact that they are not here. I would like to ask the Court, and I am embarrassed in asking it, but I do feel that this is a very important matter from the standpoint of the rights of all of the defendants whom Mr. Toulouse and I represent here—I would like to ask the Court either to take an early recess on my guarantee that they will be here at any time that the Court might be inclined to reconvene this afternoon or to give me a few minutes to ascertain just how long it will take to get them down here. I have made every effort, and I am sure my clients have made every effort to get the people down here.

The Court: Do you know how long you wish to argue the case when the case is ready for that stage of the proceeding?

Mr. Spiller: I would like to ask the Court for

not more than forty-five minutes for myself. If that is unreasonable, I don't know whether I can—well, I would say certainly between a half hour and three-quarters of an hour.

The Court: Mr. Toulouse, how much time, if you know, will you wish to use?

Mr. Toulouse: I should like at least a half hour, [318] your Honor.

The Court: Mr. Harris, how much time do you think the plaintiff ought to have for arguing?

Mr. Harris: I was hoping I could get by both on opening and closing in a half hour, your Honor, but in view of the length of the intermediate argument I may have to require and request more time.

The Court: Before acting upon counsel's request, in view of the number of defendants who are charged and the fact that they have not been heard from, why not call some of the witnesses here? Do you intend to call any other witnesses?

Mr. Spiller: If the Court please, I have no further witnesses.

The Court: Very well. The Court grants this request. The Court will recess until 1:30 o'clock.

(At this time a woman enters the courtroom.)

The Court: Is there any other witness available now? If there is, we will strike what the Court said.

Mr. Spiller: Could we recess until then if the Court please?

The Court: I would like to know whether or not there is another witness present.

Mr. Spiller: Yes. There is another witness [319] present.

The Court: If you wish a few moments to discuss this matter with this witness, you may do that. Be sure to return as soon as possible.

Mr. Spiller: Would five minutes be excessive?

The Court: That is quite all right.

(Recess.)

The Court: All are present as before the recess, and you may proceed with the trial.

Mr. Spiller: I will call Mrs. Fulford.

CHARLOTTE FULFORD

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Spiller:

Q. Mrs. Fulford, will you state your name for the record?

A. My name is Charlotte Fulford.

Q. How do you spell your last name?

A. Charlotte Fulford—F-u-l-f-o-r-d.

Q. Where do you reside, Mrs. Fulford?

A. 14215 Des Moines Way. [320]

Q. Is that in the vicinity of White Center?

A. In that general direction, yes.

Q. Are you married? A. Yes.

Q. What is your husband's name?

A. Robert.

(Testimony of Charlotte Fulford.)

Q. What is his occupation?

A. He is a carpenter.

Q. Do you have a family?

A. Yes, I have one boy.

Q. How old is he?

A. About thirteen and a half.

Q. You and your husband and your son all reside together? A. Yes, sir.

Q. At the address that you gave us as your home? A. Yes.

Q. Mrs. Fulford, what was your occupation during the period commencing July 1, 1951, and ending in June of 1952?

A. I worked in the office of the White Center Athletic Club.

Q. And for whom did you work?

A. Mr. Desimone.

Q. Had you known Mr. Desimone prior to the 1st day [321] of July, 1951?

A. Yes. I worked there as a waitress previous to that.

Q. For whom did you work then?

A. Mr. Desimone.

Q. At the same place? A. Yes.

Q. Are you acquainted with the defendants John Stepich, Harold Hopkins, Bert DePierris and Russell Felton? A. Yes.

Q. What connection, if you know, did Russell Felton have with the White Center Athletic Club? I mean during this period from July 1, 1951, through June 20, 1952.

(Testimony of Charlotte Fulford.)

A. He worked there as a bartender.

Q. For whom did he work?

A. Mr. Desimone.

Q. What connection, if any, did the defendant Bert DePierris have during that same period of time with the same establishment?

A. He worked there as a bartender.

Q. For whom? A. Mr. Desimone.

Q. What connection, if any, did Harold Hopkins have with that establishment during the same period of [322] time?

A. Nothing. They had their meetings there on Monday nights or they come in there for dinner.

Q. Who are "they"?

A. The Lions Club. They had dinner there on Monday nights.

Q. What Lions Club?

A. The White Center Lions Club, a group of men, about twenty or forty men would have a meeting there, have their weekly dinner there.

Q. Was Mr. Hopkins employed at the White Center Athletic Club? A. No.

Q. Did he ever, to your knowledge, exercise any act of managership? A. No.

Q. —any act of managership with the club or for the club? A. Not that I know.

Q. Now, with respect to the defendant Stepich, what, if any, was his connection with the business during the same period of time? A. Nothing.

Q. Did you ever see Mr. Stepich perform any

(Testimony of Charlotte Fulford.)

act of managership or of operation of the business carried on at [323] that establishment?

A. No.

Q. What service did you perform or render as an employee at that establishment during the period of time mentioned? What was your function there?

A. Well, I worked in the office, which was also the cloak room. I gave out change to people playing the machines, checked their hats.

The Court: You gave out change for what?

The Witness: For people playing the machines.

Q. What machines?

A. The slot machines.

The Court: You may continue the statement as to any other kind of work you did.

A. (Continued): Well, I checked in the hats, coats, bottles, etc. The people had to go past the check room to come in.

The Court: Anything else you did?

A. (Continued): Well, I handled the money or paid any bills that any one came to collect while I was on the shift and paid the help, like on pay day if Mr. Desimone wasn't there, because I had the money in the office there to pay them.

Q. Mrs. Fulford, approximately how many employees were there at any one time during the period that has [324] been mentioned here, that is, between July 1 of '51 and July of 1952?

A. I couldn't say positively. There were two bartenders, Russell Felton and Bert DePierris, and then there would usually be two or three waitresses,

(Testimony of Charlotte Fulford.)

and then we had people that worked in the kitchen, cook and cook's helper.

The Court: How many waitresses?

The Witness: Well, I would say two or three. It varied.

The Court: What other employees did you mention before?

The Witness: Cook and a cook's helper in the kitchen. Then we had banquet waitresses who would come in, about two banquet waitresses when we had a banquet to serve the dinners.

The Court: How many would you usually have?

The Witness: About two banquet waitresses.

The Court: They were special employees, is that right?

The Witness: Yes. That is right.

The Court: They were in addition, were they not, to the two regular waitresses?

The Witness: Yes.

The Court: You may inquire. [325]

Q. (By Mr. Spiller): Mrs. Fulford, what kind of business was operated there by the White Center Athletic Club? Just describe it as a business, that is to say the kind of service you performed, what, if anything, you sold; what, if anything, was done in the name of the business?

A. Well, it was a bottle club. People checked in their bottles. They would come in to have drinks, dance, have dinner.

Q. You have already said that you had dinners for groups like the Lions Club? A. Yes.

(Testimony of Charlotte Fulford.)

Q. Generally during what portion of the business day was the White Center Athletic Club open?

A. Nights.

Q. Was it ever open during the day for any service? Let's say in the afternoon and before 6:00 or 7:00.

A. Well, yes, it was open, but most of the people—I mean most of the business was at night, because people could come and check their bottles in and have a drink any time they wanted to when we were open.

Q. Mrs. Fulford, when it would be open in the afternoon, how many employees would that involve?

A. Oh, just usually one or possibly two.

Q. And what would that one or possibly two be doing there? [326]

A. Well, it would be the bartender.

Q. The bartender would have the place to himself, would he?

A. Yes, because there would be maybe four or five people come around in the afternoon.

Q. Now, to your knowledge, was Mr. DePierris or Mr. Felton employed there as an afternoon bartender?

A. Well, at times. I mean we would change shifts whenever it was necessary. I mean if we weren't busy in the evenings, well, we would have them work a little bit in the daytime.

Q. What I am principally getting at is were there any other bartenders in addition to Mr. Felton

(Testimony of Charlotte Fulford.)

and Mr. DePierris employed at any time during the period of time we are talking about?

The Court: You mean afternoons?

Mr. Spiller: If there were other bartenders besides Felton and DePierris during the year.

A. Well, yes.

Q. May I ask you this, too? In your statement of the employees there, did you also have a janitor?

A. Yes.

Q. Would that be in addition to the employees that you have previously mentioned such as the cook, etc.?

A. Yes. [327]

Q. And in connection with your catering to organizations such as the Lions Club, do you know whether or not there were any acts, musicians or entertainment of any sort provided by the White Center Athletic Club?

A. Well, yes, I believe there was at that period.

Q. Now, the inside of the establishment, was that one big room or was it divided into several rooms?

A. It was primarily one large room and then we had the kitchen which was off to the back, and then we had—it could be partitioned off with drapes so that it could be just partially used for private parties, private meetings, etc.

Q. As you would enter the door, was there a definite cloak room area?

A. Yes.

Q. Where was that as you entered?

A. To your right or left as you entered the door? It would be to the left.

(Testimony of Charlotte Fulford.)

Q. And to your right, was there a definite separate area?

A. Well, when you entered the club, you entered into a lobby, and the cloakroom was the left, and then you had to go through another door which would open into the main room, the main building.

Q. Where was the office? [328]

A. Well, that was where the cloakroom was, to the left as you entered the front door.

Q. Was it office and cloakroom?

A. Combined.

Q. Will you state whether or not there was a partition between the cloakroom area and the office area?

A. No, there wasn't.

Q. It was all one area?

A. It was all one area.

Q. How would you gain admittance to the cloakroom?

A. Well, there was a door from the lobby, and there was another door to go out into the club. However, those doors were always kept closed. No one was admitted.

The Court: May I interrupt? Can you each return at 1:30?

Mr. Harris: Yes, your Honor.

Mr. Toulouse: Yes, your Honor.

Mr. Spiller: Yes, your Honor.

The Court: The Court is recessed until 1:30.

(At 12:00 o'clock p.m., Friday, April 23, 1954, proceedings recessed until 1:30 o'clock p.m., Friday, April 23, 1954.) [329]

(Testimony of Charlotte Fulford.)

April 23, 1954—1:30 P.M.

The Court: The witness previously on the stand will resume the stand for further interrogation. You may proceed.

Mr. Spiller: May I ask the reporter to read the last question and answer?

The Court: You may do that.

(Last question and answer read by the reporter as follows: Q. "How would you gain admittance to the cloakroom? A. Well, there was a door from the lobby, and there was another door to go out into the club. However, those doors were always kept closed. No one was admitted.")

The Court: To which rooms did you refer when you said no one would be admitted?

The Witness: That was the office.

The Court: You may inquire.

Q. (By Mr. Spiller): Now, Mrs. Fulford, the cloakroom and the office, was that one room without any partition or was the office in any way separated from the cloakroom department?

A. Well, the cloakroom was a little room in the office or—was a little room. [330]

Q. By itself? A. It had a door to it, yes.

Q. That is what I meant. And was there any opening from the cloakroom part, separate from that door, by means of which a hat or a coat could be handed in or handed out?

Mr. Harris: I am going to object to that, your

(Testimony of Charlotte Fulford.)

Honor. It is leading, first of all, and, secondly, there are two questions there.

The Court: Read the question.

Mr. Spiller: I would like to withdraw the question.

The Court: You may do that.

Q. If a patron wanted to leave his hat and overcoat in the cloakroom, how would he accomplish that?

A. Well, he would walk up to the office and ask me to check his hat or coat.

Q. Would he go through the office?

A. No, he couldn't. The doors were locked. There was a sort of a half door so that you could see over it, but I was on one side and the patrons were on the other side.

Q. Was that the only door to the cloakroom proper, the cloakroom itself?

A. There was only one door to the cloakroom.

Q. And that was divided in two, is that correct?

A. No. [331]

Q. You could open half of it you said?

A. You could open—the cloakroom was a little room in the office. However, no one could get to the cloakroom unless they were in the office. They would have to speak to me over the half door.

Mr. Spiller: I wonder if you would give the witness that blank piece of paper and she may draw a little sketch.

The Court: You may do that.

(Bailiff hands sheet of paper to witness.)

(Testimony of Charlotte Fulford.)

Q. Now, on your sketch will you indicate by the letter "O" the office part?

A. I have already written it on here.

Q. And have you indicated by some word or by some letter the cloakroom part? A. Yes, sir.

Q. Can you also indicate on that sketch the main entrance into the club as you come in?

A. Yes.

Mr. Spiller: Now, may I have that sketch?

Mr. Harris: I think it ought to be marked. It is something handed to the witness while she was in the witness chair.

The Court: He may look at it for the moment.

Mr. Spiller: Might I ask the witness to add [332] to the sketch then?

The Court: Have it marked Defendant's Exhibit A-1.

(Sketch marked Defendant's Exhibit A-1 for identification.)

Q. (By Mr. Spiller): Will the witness then add to that sketch—it doesn't have to be to scale—the remaining part of the premises wherein the bar is, where the slot machines are, and the tables for the serving of food and serving other things?

The Court: I have never yet seen a freehand sketch that was worth anything to me, and it is not worth usually the time for producing it. This may be the one exception. We will see.

(Witness draws on sketch.)

(Testimony of Charlotte Fulford.)

Q. Mrs. Fulford, your usual employment was during what part of the day or evening or night?

A. I would go to work about 6:30 or 7:00 o'clock in the evening and work until the club closed at approximately 2:00 in the morning.

Q. What were your specific duties?

A. I worked in the office. I checked hats, coats, bottles, admitted people to the club, members and their [333] guests.

Q. Did you work there regularly evenings during the entire period? A. Yes.

Q. From June 30, 1951, to June 30, 1952?

A. Yes.

Q. Did you have access to the office at all times that you were in employment there? A. No.

Q. What would be the facts with reference to your access to the office then? Will you explain that?

A. When I worked as waitress there, I didn't have access to the office.

Q. Were you working as a waitress on some of the shifts during the period from June, 1951, to June, 1952? A. I don't believe so.

Q. I am speaking specifically now during that particular period of time while you were checking hats, making change, etc., did you then have free access to the office? A. At that time, yes.

Q. Was there change, currency, money, to which you had access in the office during your working hours? A. Yes.

(Testimony of Charlotte Fulford.)

Q. And for what purpose did you have access to the money? [334]

A. For making change for the machines or paying the help if Mr. Desimone wasn't there, if it was on Saturday night or pay day.

Q. And during this period of time about which we are talking, do you know of any one other than Mr. Desimone who had regular access to the office at times when you were on shift and working?

A. No, no one.

Q. To your knowledge, did Mr. Stepich specifically have access to the office for any purpose?

A. Absolutely not.

Q. During the time that you were on duty evenings did Mr. Hopkins have access to the office for any purpose? A. No.

Q. Did Mr. DePierris have access to the office for any purpose during the evening? A. No.

Q. There has been some testimony here that on one occasion in May of 1952 a Mr. Daggett appeared at the club during the evening. Do you know Mr. Daggett? A. No, I don't.

Mr. Spiller: May I ask if Mr. Daggett, who is present in the courtroom, may rise for the purpose of asking whether she knows him?

The Court: Yes. [335]

(Mr. Daggett rises.)

Q. (By Mr. Spiller): I will ask you to observe the gentleman that stood up in the third bank there

(Testimony of Charlotte Fulford.)

and say whether or not you recognize him at all as having ever been there.

A. I don't recognize him at all.

Q. Who closed the place up at night after the last customer had gone?

A. I did if Mr. Desimone wasn't there; I did.

Q. Approximately, in an average week, how many times would you be left to close the place, if you recall?

A. It is a hard question to answer. For the most part, he was there, but there were occasions when he wasn't.

Q. In other words, was it with any regularity that you closed up the place? A. No.

Q. On the occasions when you would close it, what would you do with the money in the office, if anything? A. Put it in the safe.

Q. Did you have the combination to the safe?

A. Yes.

Q. To your knowledge, did any one else have the combination to the safe beside yourself and Mr. Desimone? A. No.

Q. Would it be your practice when you were there [336] alone to total the receipts?

A. Yes.

Q. —total the receipts from the club, the machines, change from the machines, the bar?

A. Every day.

Q. What would you do with those receipts?

A. I would always leave them for Mr. Desimone on his desk.

(Testimony of Charlotte Fulford.)

Q. In the office? A. In the office.

Q. Did you have anything to do with keeping the books of the business other than totaling up the receipts?

A. Well, I made out the payroll sheets for the people on the payroll and all those things. It was turned over to Mr. Whittle, the bookkeeper.

Q. You would take totals from some records in the office then to turn over to Mr. Whittle?

A. I didn't do that. Mr. Desimone took care of that.

Q. I misunderstood you then before, but you kept the hours, did you, for the employees?

A. Yes.

Q. And made up the totals as to the payroll then from your record of hours, etc.?

A. That is right.

Q. Were all those records kept in the [337] office?

A. Yes, until they were turned over to Mr. Whittle, and I don't know if he returned them or not.

Q. Who was Mr. Whittle?

A. He is an accountant, a bookkeeper in Smith Tower.

The Court: Spell his name, if you can.

The Witness: W-h-i-t-t-l-e.

Q. How were you paid for your services?

A. By the week.

Q. Were you on a regular salary or did it depend upon the number of shifts that you had worked in the week?

(Testimony of Charlotte Fulford.)

A. We were paid so much a day—I mean I was paid.

Q. What was your daily wage?

A. I think about eight dollars, approximately.

Q. Did that remain the same during the entire period of time that you worked there, during the entire period involved in this case, that is between June 30 of '51 and June 30 of '52? A. Yes.

Q. Did you have anything to do with keeping track of the income and expenditures of the club?

A. No. I kept track of any transactions that I did personally on my shift.

Q. But generally as to other expenses and income of the club you had no responsibility?

A. No. [338]

Q. Did you have any agreement with Mr. Desimone other than an agreement to work as an employee and to be paid for your services as such employee at any time? A. No.

Q. Did you ever have a conversation with Mr. Desimone relating to the presence or absence of a retail liquor dealer's stamp for the place?

A. No.

Q. Did you ever overhear Mr. Desimone in conversation with any one else discussing a retail liquor stamp?

Mr. Harris: I will object to that. It would be hearsay, your Honor.

Mr. Spiller: Not in Mr. Desimone's presence.

The Court: The objection is overruled.

Mr. Spiller: Will you read the question?

(Testimony of Charlotte Fulford.)

(Last question read by reporter.)

A. Yes.

Q. Will you state what the occasion was?

A. When the Liquor Board enforcement officers were there one night. I believe it was Mr. Booth that asked, one of the enforcement officers at any rate.

Q. Could you say about when that was? In what year?

A. I don't know exactly when it was.

Q. Will you state where the conversation took place?

A. In the office at the club. [339]

Q. Do you recall whether in addition to yourself, Mr. Desimone and Mr. Booth, any one else was present?

A. There was a lot of people at the club.

Q. In the office?

A. No, not in the office.

Q. Nobody then, as you recall, other than yourself, was present in the office. Now, state to the Court and for the record what was said touching a retail liquor stamp on that occasion.

A. Well, the enforcement officer asked if there was a retail liquor stamp there, and Mr. Desimone said that there was no retail liquor stamp because we were merely serving people their own liquor.

Q. Do you happen to recall Mr. Desimone's language at the time, precisely what he said? You are relating it in the third person. I would like to have his conversation if you recall it.

A. Just word for word, no.

(Testimony of Charlotte Fulford.)

Q. Do you recall part of the conversation word for word?

A. Well, Mr. Desimone simply told the enforcement officer that we didn't need a liquor stamp, and any how that wasn't up to——

Q. Did he give a reason for that?

A. Yes, because he said we were only serving people [340] their own liquor out of their own bottles. We weren't selling liquor.

The Court: That has already been said by this witness. You should identify the enforcement officer if that is possible.

Mr. Spiller: I think the enforcement officer has been identified as Mr. Booth.

The Witness: I think it was Mr. Booth.

Q. Now, did you yourself during the period between June of 1951 and July of 1952 ever serve drinks from the bar at that place of business?

A. No.

Q. You never served them yourself?

A. No.

Q. Did you ever sell liquor by the drink during that period of time to any one? A. No.

Q. What would be the maximum number of bottles in or on the bar at one time during that period from June of 1951 to June of 1952?

A. At one time we had over six hundred bottles on the shelf on the back of the bar. Some of those bottles had stood for possibly two years without ever being touched, except once a week some of the girls took all the bottles off, polished the mirror,

(Testimony of Charlotte Fulford.)

dusted them, and put them back, [341] but there were at least six hundred of them there, more than six hundred in fact.

Q. And to whom, if you know, did those bottles belong?

A. They belonged to the members, and each of the bottles had the member's name on it, the brand of whisky, the date it was brought in there.

Q. Did you ever have any discussion with any one at the place of business or elsewhere respecting the presence or absence of a liquor stamp at that place of business other than the conversation you overheard and to which you have recently testified? Did you ever talk about an RLD stamp to any one?

A. Yes, to other people, not with reference in particular to the club, but I have talked.

Q. I am talking about with reference to the club. Did you ever discuss it with any one? A. No.

The Court: We will take a recess in these proceedings for at least ten minutes and those connected with it may now be excused.

(Recess.)

The Court: All are present as before the recess. You may resume the interrogation of the witness Mrs. Fulford. [342]

Mr. Spiller: At this time, if the Court please, we will excuse the witness, Mrs. Fulford. I would like, however, to offer for what it is worth the Defendant's Exhibit A-1 just for the purpose of clarifying her oral testimony as to the layout of the establishment.

(Testimony of Charlotte Fulford.)

Mr. Harris: No objection.

The Court: It is now admitted.

(Defendant's Exhibit A-1 received in evidence.)

The Court: You may cross-examine.

Cross-Examination

By Mr. Harris:

Q. Mrs. Fulford, have you ever been convicted of a crime? A. Yes.

Q. Did one of your duties, other than those already outlined by yourself, consist of screening anybody that happened to come to the White Center Athletic Club to gain admittance?

A. Well, we admitted members and their guests.

Q. And did you admit any one who was not a member?

A. On occasions when we had banquets. The people [343] that came to the banquets weren't necessarily members.

Q. On occasions other than the banquets, did you admit persons other than members?

A. Members and their guests only.

Q. If the guest was there without the member and sought admission, would you allow that person in?

A. If I knew that they were guests of a certain member and they had their own liquor, the member had brought them in there before, and I knew that they were their guests, on occasion I would do that.

(Testimony of Charlotte Fulford.)

Q. But you never made an exception to that, is that correct? A. No.

Q. And you say you have never seen Mr. Daggett before, the gentleman who rose here in the courtroom and whom you were asked to identify?

A. That is right.

Q. Do you deny that you ever saw him?

A. I have no recollection of seeing him.

Q. Do you deny ever having seen him, however?

A. To my knowledge, I haven't seen him.

Q. All right. Now, you have mentioned the Lions Club. Has the Dr. Edward Lincoln Smith Orthopedic Guild ever held a banquet at the White Center Athletic Club while you were there? [344]

A. Yes.

Q. Do you recall in particular the instance of February 29, 1952, that being Leap Year, the day when they held such a banquet? A. Yes.

Q. Do you recall whether or not you yourself made arrangements for that banquet?

A. I don't recall that, no.

Q. Do you recall on the 29th of February, 1952, that you presented a bill to a Mrs. Noble for payment of the number of dinners that were served?

A. I could have.

Q. And that she paid you?

A. She could have.

Q. And that you gave her a list of liquor and stated to her in substance that this is the liquor you are supposed to have brought in here, if anybody asks you?

(Testimony of Charlotte Fulford.)

A. When any one checked liquor in, they were given receipts for it. All the receipts for the liquor was made out in duplicate; one receipt went on the bottle; the other went to the person who checked the liquor.

Mr. Harris: May I have the question read to the witness?

The Court: Yes. [345]

(Last question read by the reporter.)

The Court: Answer it if you can.

The Witness: I don't know how to answer that particular question.

Mr. Spiller: May I ask the Court if the witness may be allowed to explain why she does not know how to answer that question?

The Court: The request is denied. You may inquire.

Q. (By Mr. Harris): What part of the question do you not understand, Mrs. Fulford?

A. The receipts for the liquor could have been left in the office for me to deliver to whomever was in charge of the party for that night, because when a quantity of liquor is checked in, it takes quite a long time to label each bottle and write out each receipt individually, and it has happened on occasions where people didn't stay there and wait for whoever was in charge to label all of the bottles in order for them to get the receipts, because the receipts, as I explained before, were made in duplicate, one put on the bottle, the other given to the customer, and, therefore, those receipts may have

(Testimony of Charlotte Fulford.)

been left in the office for me to give to the person in charge of the party at the time. [346]

Q. Did you give such a list to Mrs. Noble?

A. I could have.

Q. And when you gave her that list, did you tell her: "Here is the list of liquor so that in the event some one asks you you will have this list available"?

A. If she was asked to claim her liquor or——

The Court: I believe the question is, did you make a statement to her of that nature, of that tenor and effect? Read the question.

(Last question read by reporter.)

A. I am sure I didn't say that exactly.

Q. Exactly? What words did you use when you gave her the list?

A. I couldn't tell you. I don't know.

Q. In substance and effect did you not say when you handed that list to Mrs. Noble: "Here is the list of liquor that is supposed to belong to you, and if any officers come asking you any questions about the liquor, the liquor on this piece of paper is supposed to be your liquor brought into the White Center Athletic Club by your Guild"? A. No.

Q. You deny saying anything similar to that, is that correct? A. That is right. [347]

Q. Mrs. Fulford, you are being handed what is marked for identification as Plaintiff's Exhibit 3. I will ask you to look at that, particularly the handwriting, and state whether or not the handwriting of the number of bottles, the type liquor, resembles

(Testimony of Charlotte Fulford.)

your handwriting? A. It resembles it, yes.

Q. Did you make such a list from which Plaintiff's Exhibit 3 for identification is a photostatic copy? A. I could have.

Q. Do you know Sylvia Fair?

A. No, I don't.

Q. Vera McCracken? A. No.

Q. Who were some of the other bartenders that worked there during the period commencing on June 30, 1951, up to and through May 8, 1952, other than Mr. DePierris and Mr. Felton?

A. There was a man by the name of Ralph Murray, and Benny—I can't recall his last name. The records would show it, I believe. Benny Richards, it was. And Dennis—Denny we called him—I don't recall his last name.

Q. Do you recall any others?

A. I don't believe so.

Q. Did the White Center Athletic Club have a retail [348] liquor dealer's stamp?

A. Not to my knowledge.

Q. Do you recall on May 6th at approximately 8:00 o'clock in the evening that some one person came to the White Center Athletic Club and sought admission at that time and you questioned whether or not he should be admitted?

A. That would be impossible to answer.

Q. All right. Do you recall on that particular occasion that you requested the assistance of John Stepich in order to identify the individual?

A. I don't recall any such occasion, no.

(Testimony of Charlotte Fulford.)

Q. And is it your testimony that John Stepich and yourself have never at any time been in the cloakroom together at the same time?

A. That is right.

Q. And that John Stepich has never been in the small room or coin room where you get rolls of dimes and nickels to play the slot machines?

A. The only occasion that he possibly could have had to go through the front office would have been to—they kept their Lions badges, etc., in back on top of the safe, and they only took them out on Monday night, and he could have gone through the office at that particular time to get those badges and flags, etc., for their [349] meetings. Other than that, no one was allowed in the office.

Q. John Stepich was allowed in the office?

A. On Monday nights, to walk through there to get their Lions Club paraphernalia, and that was all.

Q. He was allowed in there with that qualification?

A. That is all.

Q. But Bert DePierris wasn't allowed in there at all, was he?

A. No, he wasn't?

Q. And neither was Russell Felton, is that your testimony?

A. That is right.

Q. Do you recall the evening of April 6, 1952?

A. Not without relation to some incident.

Q. All right. When Russell Felton was present, and Mr. Turner, Mr. Booth and Mr. Burke arrived there and had a discussion with him?

A. I am quite sure I was probably there.

Q. Do you recall that at that time Mr. Felton

(Testimony of Charlotte Fulford.)

was pretty dissatisfied with the position that he had been left in? A. Yes.

Q. And do you recall that you attempted to keep him quiet? [350]

A. Well, I think—I am sure he was upset. I mean because he didn't like to be arrested, and here he was just working part time, and he had just come to work probably only to work for a couple of hours.

Mr. Harris: May I have the question read?

The Court: Read the question.

(Last question read by the reporter.)

The Court: I think the answer is yes or no. That is all that is asked for.

A. Yes.

Q. Why did you attempt to keep him quiet and keep him from talking to the officers?

The Court: Now you can make any explanation that you feel should be made.

A. Well, it wasn't a question of keeping him from talking to the officers. I felt that there was no need to get upset about being arrested—I mean if that was the way it had to be. I mean Mr. Desimone had left——

Q. Do you deny that you attempted to keep him from talking to the officers?

A. We all talked to the officers. He could talk to them all he felt like.

Mr. Harris: May I have the question read to the witness?

The Court: You may. [351]

(Testimony of Charlotte Fulford.)

(Last question read by reporter.)

A. I deny it, yes.

Q. That you didn't attempt to, is that correct?

A. That is right.

Mr. Harris: That is all.

The Court: Any further questions?

Mr. Spiller: Just one question, if the Court please.

Redirect Examination

By Mr. Spiller:

Q. You have testified that you have been convicted of a crime. What was that?

A. Possession of liquor.

Q. And when was that? Just within what period of time? A. Just last May, I believe.

Q. Last May or May of 1952?

A. No. It was 1952.

Q. Was it in connection with the White Center Athletic Club? A. Yes.

Mr. Spiller: That is all.

The Court: Possession of liquor, do you say?

The Witness: Yes. [352]

Q. (By Mr. Spiller): Was that in Justice Court in King County? A. Yes.

Mr. Spiller: That is all.

Mr. Harris: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

ELROY LAURENCE McINTYRE

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Toulouse:

Q. What is your complete name, Mr. McIntyre?

A. Elroy Laurence McIntyre.

Q. Will you spell your last name for the Court?

A. M-c capital I-n-t-y-r-e.

Q. Where do you live, Mr. McIntyre?

A. 14431-8th Avenue South.

Q. How long have you been a resident of Seattle?

A. Since 1921 except for from 1930 to 1942 when I was in Spokane. [353]

Q. During what period of time have you known Mr. Harold Hopkins?

A. I have known Mr. Hopkins since about April, 1947.

Q. In what connection did you know Mr. Hopkins?

A. Well, I have a dental laboratory at 9424 Delridge Way, and Mr. Hopkins at that time had a cafe, a small cafe, across the street from me. It was in the 9400 block on 17th. Delridge and 17th come in together there.

The Court: What year was that?

The Witness: That was from 1947 until Mr. Hopkins closed the place. That was just last——

(Testimony of Elroy Laurence McIntyre.)

The Court: Was 1947 the earliest year of your acquaintanceship?

The Witness: Yes, your Honor.

The Court: You may inquire.

Q. (By Mr. Toulouse): How long, to your knowledge, did Mr. Hopkins operate this cafe that you are talking about?

A. Well, all during that period until he sold out, and I can't remember——

Q. Specifically, did he operate it during the year 1951 and the year 1952? A. Yes.

Q. How frequently did you see Mr. Hopkins during the year 1951 and the year 1952? [354]

A. Well, just about every day.

Q. How would you happen to see him?

A. Well, I ate lunch in his restaurant practically every day.

Q. Are you acquainted with Mr. Hopkins' general reputation in the White Center area?

A. Yes.

Q. Are you familiar with his reputation for veracity and good citizenship?

Mr. Harris: I am going to object to that.

Mr. Toulouse: I withdraw the question.

Q. Are you familiar with his general reputation for good character and good citizenship?

A. I have always considered his character excellent.

Q. First, are you familiar with his general reputation in that community for good character and good citizenship? A. Yes.

(Testimony of Elroy Laurence McIntyre.)

Q. Now, what is that?

A. As far as I know, it has always been excellent. He was well liked in the community.

Mr. Harris: He has answered the question, your Honor.

The Court: That is sufficient.

Q. Are you acquainted with Mr. Hopkins' [355] family? A. Yes.

Q. Does he have a family? A. Yes.

Q. How many children does he have?

A. Four, I believe.

Mr. Toulouse: That is all.

Cross-Examination

By Mr. Harris:

Q. Ever been to the White Center Athletic Club?

A. I was there on one or two occasions.

Q. Ever drank liquor there?

A. About two drinks is all.

Q. Have you heard that Harold Hopkins has held himself out as secretary-treasurer of that club?

A. No.

Mr. Harris: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Spiller: If the Court please, I would, just prior to resting of the defendants' case, I would like to state to the Court that because of a misunderstanding upon my part I neglected to ask two of the witnesses [356] this morning who appeared

here as character witnesses for Mr. Stepich the same questions with respect to Mr. Hopkins. Mr. Harris has advised me——

The Court: You may call them back. Are they here now?

Mr. Spiller: I think we can do it by stipulation. Mr. Harris has agreed with me, if the Court is willing, that the record may show that Mr. Val Kirk and Mr. Al Beal, the pharmacist and the Hudson Motor dealer at White Center, would testify to the good character of Mr. Hopkins as well as of Mr. Stepich.

The Court: Does the Government so stipulate?

Mr. Harris: It may be stipulated, your Honor.

The Court: That stipulation may be entered and the Court will consider it.

Mr. Spiller: With that, the defendants rest, if the Court please.

The Court: Each and all of the defendants now rest, do they?

Mr. Spiller: As to each and all of the defendants.

The Court: Any rebuttal?

Mr. Harris: No, your Honor.

The Court: We'll take about a fifteen-minute recess at this time. [357]

The Court: Let the record show that all are present as before the recess.

Any rebuttal?

Mr. Harris: No, your Honor.

The Court: Plaintiff rests?

Mr. Harris: Yes, your Honor.

The Court: As I understand it, all other parties,

in particular each and all of the defendants, now rest?

Mr. Spiller: That is true, your Honor.

The Court: Was there something you wished to say before we hear the arguments?

Mr. Spiller: Just a formal renewal for the record of the several motions that have been made, if I may have just a moment at this time.

The Court: You may make that.

Mr. Spiller: I would like to renew for the sake of the record and without elaboration the motion to dismiss the indictment made before the hearing herein upon the ground and for the reason that, as heretofore stated, the indictment states an ambiguous single charge as to which the defendants and their counsel have been unable to determine precisely what the charge against them is.

I would like, also, for the sake of the record, to renew the defendants' motion to strike the following exhibits, that is to say Exhibit 1, being the verification [358] of Harold Y. Hopkins before Max Nicolai, Plaintiff's Exhibit 2 and each and every component sheet thereof, Plaintiff's Exhibit 4 and each and every component sheet thereof, and Plaintiff's Exhibit 5 and each and every component sheet thereof, each of said exhibits and the several component sheets of the exhibit bearing a signature of an individual defendant in this case, as to which signature and the making of the signature there has been no proof of the making thereof, no identification from any witness who has identified the signatures or the documents, and for the further

ground and the further reason that Title 28 of the U. S. Code, §1733, does not permit the introduction of said exhibits.

I would like, also, for the sake of the record to renew the motion for acquittal made at the conclusion of the Government's case, the motion being for each and every one of the defendants, and I renew that motion upon the ground and for the reason that the Government's case in chief did not prove facts sufficient to authorize a conviction in this case.

The Court: The motions, and each and all of them, are denied. Were those all the motions?

Mr. Spiller: Those were all the motions.

The Court: I don't think we ought to work in this case any longer than 4:30 o'clock. Can all of you [359] finish your arguments by that time?

Mr. Harris: I will make every effort.

Mr. Spiller: I will make every effort to confine myself if the Court please.

The Court: I will hear counsel for the plaintiff at this time.

(Mr. Harris summed up the evidence to the Court on behalf of the plaintiff.)

(Mr. Spiller summed up the evidence to the Court on behalf of the defendants.)

(Mr. Toulouse summed up the evidence to the Court on behalf of the defendants.)

The Court: A conspiracy, as the word is used in the conspiracy law and in this indictment and, in particular, Count I thereof, is an agreement between two or more persons acting upon a common purpose to commit an offense, insofar as this case is con-

cerned the particular offense which is described in this Count I of the indictment.

There can be no conspiracy of any kind unless three elements are present. Those are: First, the act of conspiring together of two or more persons; Second, to commit the particular offense charged in the indictment; and, Third, the doing of something in furtherance of the unlawful design. [360]

There is no such thing as one person conspiring. A person who alone plans and commits a criminal act is not guilty of conspiracy. It is not necessary to render a person guilty of conspiracy that he be one of the original persons forming the conspiracy. He may have joined it after its formation, and if so, he thereby becomes as guilty as one of the original conspirators. However, to render such a person guilty under such law, it is necessary that after he has become a member of such conspiracy some act be done by one of the conspirators toward carrying out the unlawful agreement of the conspiracy, although it is not necessary that such act accomplish the purpose of the conspiracy. It is only necessary that such act be done for the purpose of carrying the conspiracy into effect whether it is finally consummated or not.

In order to establish the guilt of a particular defendant under the conspiracy count, it is necessary that the Government prove by the evidence beyond a reasonable doubt, first, that the conspiracy was formed as alleged, and that it was entered into by the particular defendant as charged and, second, that within the jurisdiction of this Court, after that

particular defendant became a member of such conspiracy, one or more of the overt acts of the conspiracy were committed as alleged in the indictment. [361]

The common design, purpose, agreement and co-operation among the participants in the conspiracy are the essence of it. To prove that a conspiracy existed and was in operation, it is not necessary that two or more persons entered into a written or express agreement or made any formal declaration acknowledging membership in the conspiracy, but it is necessary to prove by competent evidence beyond a reasonable doubt that they knowingly and intentionally co-operated in furtherance of the common unlawful plan previously formed.

Conspiracy may exist either to do something unlawful or to do a lawful thing in an unlawful way.

It is not necessary that the Government prove every overt act as charged in the conspiracy count. Proof of one such act occurring within this Court's jurisdiction is sufficient.

A conspiracy may be established by circumstantial evidence or by deduction from all the facts proved. The common design is the essence of the crime, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, if such conduct of the parties leads to the same unlawful result.

If the parties acted together to accomplish something unlawful as charged, a conspiracy is shown even [362] though individual conspirators may have

done acts in furtherance of the common unlawful design apart from and unknown to the others. All the conspirators need not be acquainted with each other. They may have not previously associated together. One defendant may now know but one other member of the conspiracy, but, if knowing that others have combined to violate the law, a party knowingly co-operates to further the object of the conspiracy, he becomes a party thereto.

The Court finds, concludes and decides from the evidence in this case beyond a reasonable doubt that the material allegations in Count I of this indictment are sustained; that all of the overt acts set forth in the indictment, except the fifth one, have been established; and that they are all referable to the conspiracy alleged in that count and tend to a more complete and effectual accomplishment of the conspiracy set forth.

As to over act "1," the Court does not have the view that every one of the defendants participated therein. The Court also is of the opinion and finds it is not necessary that every one of them did so if there were two of them who did, and the Court finds, concludes and decides from the evidence beyond a reasonable doubt that there were two or more of the named defendants who participated in that overt act. [363]

Further from the evidence beyond a reasonable doubt the Court finds, concludes and decides that as to said Count I of this indictment in this Cause No. 48570 against the defendants and each and all of them that the defendants are guilty as charged in

said indictment and in particular Count I thereof, and they are convicted.

The Court will now, after consulting with counsel, consider and fix a future date for the imposition of judgment and sentence. That is the occasion when much of the argument made here today will be again considered, namely, the extent of the responsibility and the relative parts played by the various defendants and the relative importance thereof in respect to this matter. The Court intends to have that argument in mind on that future occasion, and it is on that occasion when the policy of the law which Congress has fixed and this Court has no right to fix may properly be applied to the facts and evidence in this case as it concerns each one of these defendants separately.

I wish it were possible for all the witnesses to be here on that future date. I am not requiring it but I wish it were possible. The Court may wish to make some remarks then that they may want to hear. They may not wish to hear them, but it might be worthwhile for them.

Mr. Spiller: Do I understand the Court to say he [364] wishes the witnesses here?

The Court: I had in mind the prosecuting witnesses in particular.

Mr. Spiller: If the Court please, may I at this time on behalf of Mr. Toulouse and myself and on behalf of these defendants request that the Court make a special finding with respect to the elements of conspiracy as proven against each of these individual defendants? That is in accordance with Rule 23 of the Rules of Criminal Procedure.

The Court: The Court cannot tell you whether the Court will make the finding unless the Court first sees the finding you request the Court to make.

Mr. Spiller: May time for that be set?

The Court: I intend to settle everything on the future date to be named.

Mr. Spiller: That is satisfactory.

The Court: Every possible question is what I intend to settle on that date, and I am not saying the Court will adopt the form of finding you request the Court to make, but I am saying the Court will consider it on that date.

What have counsel to say about the need of pre-sentence investigation and report in respect to any one or all of these defendants? [365]

Mr. Toulouse: I don't think there is any necessity with respect to at least two of the defendants, and with respect to the one——

The Court: I imagine counsel will be able to tell the Court anything about the responsibilities of the defendants in connection with their past court experience, and I do not think a probation investigation is necessary for that. Counsel themselves can tell the Court about any experiences that the defendants may have had previously with the law.

Mr. Spiller: We can do that.

The Court: What is the Government's attitude, Mr. Harris?

Mr. Harris: I will be governed by the attitude of Mr. Spiller and Mr. Toulouse, your Honor.

The Court: The Court dispenses with a probation investigation and report expressly in this case

and directs that none be made. I believe that is not necessary, but I wish every one to know that I think counsel in the case can by consulting with law officers in the community and the records sufficiently advise the Court of any record as to law enforcement or law violation that may pertain to each defendant. The Court will depend upon counsel to advise the Court along that line.

Is there any reason why counsel and the [366] defendants cannot be here on May 10 at 9:30 o'clock in the forenoon? That is Monday.

Mr. Harris: It is agreeable with the Government, your Honor.

The Court: This matter is now continued until May 10, that being Monday, at 9:30 o'clock in the forenoon for all purposes including the disposition of any and every legal question that may then be involved or pending and for the purpose of imposing the judgment and sentence of the Court.

Is there any reason why the defendants should not continue on their present bonds until then or until the further order of the Court?

Mr. Harris: No, your Honor.

The Court: I wish each defendant would be ready at that time to perform the judgment and sentence of the Court as the Court may then require. It is necessary that each defendant with his counsel be present at that time, also the Government counsel.

The Court is now adjourned.

(At 4:40 o'clock p.m., Friday, April 23, 1954, proceedings recessed until 9:30 o'clock a.m., Monday, May 10, 1954.) [367]

Certificate

I, Frances I. Gilligan, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ FRANCES I. GILLIGAN,
Official Court Reporter.

[Endorsed]: Filed May 11, 1954.

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 48570

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PETER DESIMONE, JOHN STEPICH, HAR-
OLD HOPKINS, RUSSELL W. FELTON,
and BERT DePIERRIS,

Defendants.

IMPOSITION OF JUDGMENT
AND SENTENCE

This Matter having come on for the imposition of judgment and sentence before the Honorable John C. Bowen, Judge of the above-entitled Court, on Monday, May 17, 1954; plaintiff appearing by its

attorney, Richard D. Harris, Assistant United States Attorney; defendants appearing in person and by their attorneys, George J. Toulouse, Jr., and John Spiller, the following occurred:

The Court: Are counsel ready to proceed in Cause No. 48570 entitled "United States of America, Plaintiff, vs. Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton, Bert DePierri, Defendants"? [1*]

Mr. Harris: Yes, your Honor.

Mr. Toulouse: Yes, your Honor.

The Court: Will each and all of them now come forward with their counsel?

(Defendants, their counsel and plaintiff's counsel come forward.)

The Court: I wish Mr. Desimone first on my left and then Mr. Stepich, Mr. Hopkins, Mr. Felton and Mr. DePierris in that order. Are each and all of those defendants now in person before the Court?

Mr. Desimone: Yes.

Mr. Stepich: Yes.

Mr. Hopkins: Yes.

Mr. Felton: Yes.

Mr. DePierris: Yes.

The Court: And they are represented by their counsel, Mr. Toulouse and Mr. Spiller, who are also present?

Mr. Spiller: That is correct, your Honor.

Mr. Toulouse: Yes, your Honor.

The Court: Government counsel is also present.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Harris: Yes, your Honor.

The Court: I might also suggest that if any members of the families of any of these defendants are present I would welcome your taking seats here in the [2] jury box where you may hear better and also participate in the hearing if you wish to do that. I also would like to suggest if there is any witness in this case who appeared either for the Government or the defendants or any one of them who is present, I would like you to come forward where you can hear what is said and done in this case.

Mr. Spiller: If the Court please, so that there may be no misunderstanding, I am not certain that all of the people in the jury box are relatives.

The Court: Or friends if they wish to be present.

Now, I would like the Assistant United States Attorney, Mr. Harris, to remind the Court of what the Government contends is the maximum penalty of the law provided in this case.

Mr. Harris: As to each, a fine of not more than Ten Thousand Dollars or imprisonment for not more than five years or both.

The Court: Is that the understanding of defendants' counsel?

Mr. Toulouse: That is correct.

Mr. Spiller: That is correct.

The Court: My understanding is that this has come on now before the Court for the purpose of imposing [3] the judgment and sentence in this case as to each one of the defendants in pursuance of the Court's previous decision and finding of con-

viction and guilt as to each defendant in this case, is that your understanding?

Mr. Harris: Yes, your Honor.

Mr. Toulouse: That is correct.

The Court: Is there any reason why the Court should not do that at this time?

Mr. Harris: The Government knows of no reason.

The Court: What facts does the Government wish the Court to consider?

Mr. Harris: Your Honor, I am assuming that we all have a recollection of what transpired at the trial. I would like only to add to that very briefly that from the investigation conducted by the Federal Alcohol Tax unit, which in part was an investigation coupled with the State of Washington Tax Department and Alcohol Tax Department, that the investigation disclosed that Peter Desimone was the primary and motivating factor in this whole matter; that he was the core, the brains; and that the whole set up all originated and commenced with his undertaking, and with his discontinuance of the matter the whole thing then came to an end; but that he was the primary and motivating factor; that the defendants Stepich and Hopkins had knowledge of what was going on but [4] did not in any way in any degree measure up with what Peter Desimone himself actually did. We believe that he reaped all the profit or most of the profit that was able to be made out there. That the two defendants, Felton and DePierris, while they knew what was going on, were in no way, other than their salary and tips, if

any, benefitted by this operation. Their activity in the conspiracy was more or less controlled—or their active participation in it when they were allowed to participate was controlled by Peter Desimone.

I believe, your Honor, that without going into the details that covers the matter.

The Court: Have you any knowledge from your investigation and handling of the matter as to how long a period of time was involved other than that disclosed by the evidence and whether or not there was a substantial amount of business done as result of the law-breaking or in connection with the law-breaking alleged in the indictment?

Mr. Harris: The operation continued even after the indictment period without the alcohol tax stamp. However, as to the income, the amount of income that Mr. Desimone was able to secure is not available. We have an estimation but in no way any basis for it. It operated profitably. It owned a Seventeen Thousand Dollar bar [5] installation, and based upon that, the profits certainly must have been commensurate with that outlay of cash.

The Court: Mr. Stewart, I would like to have you make a very brief statement, if you have any information on which to base it, as to the background of each one of these defendants, and, of course, that will include anything that may be favorable or unfavorable to them.

Mr. Stewart: Peter Desimone, your Honor, is 49 years of age, was born October 10, 1905, in Seattle, Washington. He is the oldest child in a family of five, being four boys and one girl. The father,

Joe Desimone, who operated and first started the Seattle Public Market was a well known figure in the City of Seattle and a well thought of person in this community.

Pete Desimone has lived in this community practically all of his life. He graduated from Queen Anne High School in 1924. After leaving school, he entered the wholesale and retail produce business along with his father at the public market.

In 1932 he became interested in the tavern business. Since then, according to reliable information we have received from businessmen and public officials, Peter Desimone entered into questionable business ventures involving the operation of clubs, taverns and "bookie [6] joints." At one time Peter Desimone was said to be quite wealthy, claiming that he made most of his money in real estate.

He is married, having married in 1925, and is the father of one daughter. His present address, as he gave it to the Probation Office, is that he resides at the Longacres Track in Renton where he works as a groom, walking horses for a local horse owner. We couldn't learn his correct address. However, we did contact his mother and the mother stated that his home was there.

In checking the police record of Peter Desimone, your Honor, it was found that on February 3, 1937, he was arrested by the Sheriff's Office in Seattle, Washington, for possessing gambling devices. At this time he paid \$25.00 costs and for malicious destruction of property; \$1.00 and costs on assault,

3rd degree; and \$200.00 in costs on possessing gambling devices.

Mr. Desimone told us he doesn't remember the first two charges, but the \$200.00 fine was paid, and it referred to slot machines he had at the Fiesta Tavern at 85th and 15th Ave. N.W.

On June 9, 1950, he was arrested by the Sheriff's Office for violation of the Steele Act and there was a \$250.00 bail posted. On June 10, 1950, he was again arrested by the Sheriff's Office for violation of the Steele [7] Act and another \$250.00 bail was posted. He stated that he thinks the bail was reduced and then forfeited. This involved the White Center Lions Club and was possession with intent to sell.

On February 5, 1952, he was arrested by the Sheriff's Office in Seattle, Washington, for the possession of liquor with intent to sell and forfeited \$125.00 bail.

On September 30, 1952, he was arrested by the Sheriff's Office, Seattle, Washington, driving while license suspended, no driver's license. This was in Judge Hanson's court in Renton, Washington, and he posted \$250.00 bail. Mr. Desimone informed us that he paid \$80.00 fine on this.

On October 7, 1952, he was arrested by the U. S. Marshal in Seattle, Washington, for violation of the Federal liquor laws, which is the current case.

On July 13, 1953, he was arrested by the Sheriff's Office, Seattle, for failure to stop at an arterial. A warrant was not served inasmuch as they could not find the defendant.

On October 28, 1953, he was arrested by the Sheriff's Office in Seattle, Washington, possession of liquor with intent to sell, selling liquor by the drink.

On December 15, 1953, in Judge Knott's court, he was [8] fined \$500.00 and costs and gave notice of appeal. On November 9, 1953, he was arrested by the Sheriff's Office, Seattle, Washington, for possession of liquor with intent to sell, sale of liquor by the drink. No disposition was shown in this case.

On November 13, 1953, he was arrested by the Sheriff's Office, Seattle, Washington, keeping and possessing slot machines in public place. This was dismissed and the law declared unconstitutional.

On December 14, 1953, he was arrested by the Sheriff's Office, Seattle, Washington, for possession of gambling devices and was fined \$100.00 in Judge Hoar's court.

He informed us that he wasn't present at the October 28, 1953, violation, "but it was my place of business and I was convicted after I returned from California." He settled the fine. The November 9, 1953, arrest involved the same case as the October 28, 1953, arrest. He stated that he never operated after October 28, 1953, and the other charges were added. He was convicted and paid the fine and costs in December, 1953.

On January 22, 1954, he was arrested by the Sheriff's Office in Seattle, Washington, for the possession of gambling equipment and running a "bookie." This was in Justice of the Peace Moore's court in White Center, [9] and for that he posted

bail of \$100.00. He stated that he paid the \$100.00 and: "That involved their taking slot machines from me which I had bought at auction from the State Tax Commission. Joe Norby and Jim Waters, Tax Commission people, sold me them. I paid \$100.00. It is all a matter of politics, strictly."

In 1937, according to Police Chief Lewis of Bremerton, who was a witness in the case, "Desimone was involved with the then mayor of Bremerton, one Jesse Knabb. Charges involved an attempt to bribe the then prosecuting attorney, Ralph Pervis, with gifts in Desimone's attempt to get in on some pin-ball deals or arrangements in Bremerton." It was understood he connived with the mayor. Desimone turned State's witness in that case and there was no action taken against him.

He has no military record, your Honor, and from the information that we received Desimone receives from his father's estate, or should receive from his father's estate, between \$5,000.00 and \$6,000.00 a year. However, we have learned from the mother that he has never had this money, and it is felt that much of that money is presently being used for paying tax liabilities and penalties and interest which he had assessed against him.

In 1944, he had a tax liability of penalties and interest in the amount of \$7,054.06. However, [10] he paid that off.

The Court: Mr. Stewart, may I interrupt you now? Were you able to find out whether or not he realized any profits out of this business out there?

Mr. Stewart: He did not realize any profits out

of the business. As a matter of fact, I don't think Pete Desimone has any money. He is out walking horses at the race track and is just trying to make a living by doing that out there.

According to the information that we received, when his daughter got married he did not even appear at the marriage of his daughter, and it was felt by many concerned that his reason for not doing so was that he did not have any money to buy a gift for the daughter at the time of her marriage and also due to the fact that he has been ashamed of himself by these arrests that he has had.

The Court: Now, as to the other defendants, did any of them make any money out of this transaction?

Mr. Stewart: No, your Honor. The only two that made any money out of the transactions were the two bartenders who made their salary.

The Court: Does any one of the other defendants have a criminal record?

Mr. Stewart: Stepich had no criminal [11] record. Mr. Hopkins has no previous criminal record.

On Felton, your Honor, it was found that he had some juvenile court record. That on May 22, 1935, he was taken into custody by the King County Juvenile Court, suspected of stealing, and he was committed to the Luther Burbank Parental School and was parolled from that school on September 6, 1936. On May 6, 1940, he was sent to the Washington State Training School at Chehalis, Washington, on a charge of auto theft and was parolled from that school after serving not quite six months.

The Court: About what age was he?

Mr. Stewart: At that time, your Honor, he was 17 years of age.

The Court: Has he been in any trouble since then before this occurred?

Mr. Stewart: Not before this occurred, and all the record he had since this occurred was working out there and selling the liquor, and it was arrests by the State Liquor Board.

The Court: Has Mr. DePierris any record?

Mr. Stewart: Yes, your Honor. It is a juvenile record. On May 14, 1934, a petition was filed, child without guardianship, both parents deceased, disregarded property rights of others. On September 19, 1934, he was [12] made a ward of the court, placed in temporary custody of foster homes, to report on probation status.

On January 29, 1936, he was placed in detention, no details given or charges placed in this detention. On March 2, 1936, he was given a suspended commitment to the Washington State Training School, Chehalis, and ordered to reside with his brother, Wesley.

Now, the only other charges he has had against him were when he has been acting in the capacity of a bartender in 1952. Then, on January 7, 1953, in Justice Court, Judge Moore, South End, domestic difficulty. A complaint was dismissed on the wife's affidavit and the costs paid by the defendant.

I might state that in the course of our investigation and from information that we received, not from either Mr. Stepich or Mr. Hopkins, and from

information received by the bank at White Center, it was learned that a petition had been circulated by the White Center Lions Club and the White Center Chamber of Commerce in behalf of Mr. Stepich. Also, at one of their regular meetings, an endorsement for Mr. Stepich was acted upon by the Eagles in the White Center district. A petition for Mr. Hopkins also was being circulated in that district, and I feel confident that these men knew nothing about it. It was circulated by somebody else from the [13] information that we received from the bank. I might state that those two petitions have been turned over to their attorneys along with the letter from the Eagles and they can present it to your Honor at that time.

The Court: We will undoubtedly have a recess in these proceedings at 12:00 o'clock until some later hour. Until then we will proceed. I will be glad to hear any statement that defendants, their counsel, or their friends wish to make which is pertinent to the case, and I wish counsel to feel the Court will have time to hear them for any reasonable statement no matter if it runs into the afternoon. The only thing is I will probably make some suggestions about trying to write up some forms as far as you can go with them during the noon hour so as to save time and to make it possible that the judgments and sentences in these cases and any orders that may be different from the judgments and sentences can be entered today. The Court must do it today. Proceed.

Mr. Toulouse: Your Honor, on behalf of all of the defendants, since the primary question before

the Court at this time—the Court under the statute is vested with the discretion of either fining these people or incarcerating them in a penitentiary. I am of the opinion that considering the nature of the offense—this [14] offense is a crime of omission. It is a statutory offense. It is not a criminal offense against nature, and it is not a crime in any sense against the rules that God has prescribed that Christian men live by. It is strictly on the same classification as a person failing to get a license. It is on the same classification as an individual that fails to comply with some statutory requirement that is contained, as your Honor knows, in some thirty or forty volumes of the Federal Code and contained in innumerable volumes of State reports.

In this particular case, it seems to me that the quality of the offense certainly with respect to this particular operation, and I say this candidly to your Honor, that a mountain has been made out of a mole hill, in my judgment, to bring an action of this nature under the conspiracy statute, making it equally applicable to a case of this character as would be applicable to a case involving murder, larceny, rape, and all the heinous felonies, and to brand these people as people of that stamp is, in my judgment, not treating the offense for what it is. The individuals in this particular case, at least four of them, are victims of circumstance, and at least one of them was certainly the victim of an honest judgment with reference to his difference of opinion with respect to State law. In one instance he reversed the [15] State law in the Supreme Court,

and in the other case it wasn't until after the case went to the Supreme Court twice that they finally came out with a 5-4 holding as to the Steele Act, whether or not that was constitutional.

The Court: Mr. Toulouse, may I hear your comments on the facts in this action?

Mr. Toulouse: Yes, I will confine myself to that. Mr. Stepich here is a man who is 42 years of age. His wife is a teacher. He has a boy 11 years old. He has had five years service in the Army. Worked in the King County Park Department for three and a half years. Past chairman of the March of Dimes, the Red Cross, the Good Neighbor Fund, past president of the White Center Commercial Club, Lions Club, past commander of the American Legion. He is the West Side chairman of the American Legion boys baseball, and he has no previous offenses. I might say to the Court that here is a petition that I received from——

The Court: Would you kindly read the substance of it?

Mr. Toulouse (Reading): "We, the undersigned members of the Lions Club and White Center Commercial Club, of which Mr. Stepich has been past commander, we at this time here affix our signatures stating that during this time Mr. Stepich has been a 100% American citizen and at [16] all times endeavored to work for the betterment of the district." Included are business and professional men who know this man. There appear in the neighborhood probably of 75 or 80 signatures, your Honor, of men in that group.

Now, with respect to Mr. Stepich, I think your Honor has the evidence in mind. In that particular matter, it is true that he was out there. It is true that he is guilty by view of the fact that he was guilty of association. There is no evidence that he committed any of the overt acts charged in the indictment. He was there. Certainly there is no evidence that he obtained anything, and, as Mr. Stewart said, I am confident that he never received any gift, never received any money, never received anything from the entire operation. Well, from the facts I have recited, it seems to me, your Honor, the nature of this particular offense as to a man of Stepich's stamp, you just couldn't have an individual of that particular stamp committing a crime against his sovereign, knowing that he is committing that type of an offense. He is certainly not the type of man this Court would not feel free to have at large or is he not a type of man who is not a credit to the society in which he lives. It seems to me that bearing in mind the only purpose of punishment, that this is a proper case for [17] your Honor to exercise judicial discretion and equity, and that true justice demands that your Honor should, in my judgment, as to the defendant Stepich either suspend a sentence or fine the individual for the offense.

Now, as to the defendant Hopkins, we have a man that has a wife and four children. He has a little baby coming along in a couple of weeks. He is the past president of the Lions Club and he operated his own restaurant in the White Center area for a number of years. He now works at the Reliable

Fish Market. He is well thought of in his entire community. He has no past record at all. His connection with the offense is the same as that of Stepich, as Mr. Stewart has said, and I am confident that Mr. Hopkins never received one penny by way of gift, money, salary or otherwise. He was there. I likewise have a petition that was——

The Court: Will you let me have the benefit of the substance of it?

Mr. Toulouse: Yes, your Honor. It apparently was received by Mr. Stewart. Anyway, it says:

“We, the undersigned business men of White Center Business District of our own free will respectfully submit this testimony in behalf of Harold Hopkins and urge it be given consideration. Harold Hopkins is and has been [18] for several years a substantial businessman in our district. He is well liked and highly respected. He is a tireless worker in community enterprises and unselfishly devotes his time and energy to helping others through the local Lions Club and other groups. We are in no way attempting to prove or disapprove any connection he may have had with the White Center Athletic Club. We are interested in having the Court know that as fellow businessmen we regard Harold Hopkins as a good citizen.”

To my mind the fact that those businessmen would put their signatures on that type of a statement speaks far more eloquently than any words I might possibly have to say at this time. The most I can say is that certainly considering the nature of

the offense and Hopkins' connection with the offense and the stamp of the man as demonstrated by his entire life as demonstrated by the confidence of these individuals in him that even the most sincere advocates of incarceration would not advocate it would be in the interests of the United States or in the interests of society as a whole to incarcerate this man. I certainly think a fine as stated by the statute where your Honor is given a disjunctive discretion, that a fine should certainly operate as a deterrent and give [19] this man a real opportunity to rehabilitate himself.

Now, as to the defendant Bert DePierris, you heard his only offenses. Mr. Stewart has indicated to the Court something. Mr. DePierris is now 35 years old, and so when these things occurred, he must have been about 15 and he became a ward of the Court. I am not going into that but obviously the circumstances at that particular age were a juvenile problem. It certainly should have no influence upon the Court at this time in view of the fact that there is no evidence of his commission of any type of an offense involving intent or of a moral nature or that would be mala in se.

The Court: Did he receive any punishment in the State Court on account of this offense?

Mr. Toulouse: Yes. In that connection, he paid a fine in the State Court in connection with being picked up for selling whiskey out there. If your Honor recalls his testimony, he testified that later in May, right after Mr. Daggett was out there, Mr. Felton and Mr. DePierris quit. They have been

elsewhere employed, and that is two whole years ago, and since the time of the indictment they have been prompt in coming to Court. They have been prompt in giving their probation reports. They have been in attendance in this Court, as it were, for two years, and Mr. DePierris has paid his fine [20] under the Steele Act. Since that time his conduct has been good. He has not been employed in any establishment even remotely dealing with spiritous liquors. He has been longshoring for a living, and his wife and his daughter are right here in town. It seems to me it would be a crying shame in light of the fact that this man could not possibly—he didn't know anybody until January, 1952, and he works there for six months, and I think the showing is he worked there part time, and he made altogether in salary some \$700.00 or \$800.00, I think it was.

Mr. Felton, to come to him, he is a young man, 30 years old. He has two children, one 6 and one 11. They are both boys. His wife and he live here in town. He has never been in any trouble since the time that he was picked up involving the Steele Act, and he paid his fine in both instances under the Steele Act. Since then, some two years ago, his conduct has been impeccable.

His juvenile record, I am not going to make any further comment on that. I think the Court realizes at that time, from the Court's question, that he was just a boy, and that type of offense has not been in any way reproduced in the last 19 years, I believe it is, if I add right, so certainly there is no

indication that Mr. Felton has not lived as a man of good character other than this [21] particular Steele Act violation.

Now, as to both of these bartenders, there is one pertinent comment that I would like to make. It is true, your Honor, that they did sell whiskey. It is true, however, in the economic scheme of things that we presently have, if a person is an employee and the obligation was that of the establishment to have this stamp, any bartender in the State of Washington might very well be in the same position because his employer perhaps failed to get a stamp.

The Court: I will have to interrupt you here. Can you be back at 1:15?

(All parties nod assent.)

The Court: In the meantime, if you can get started on any part of the typewriting work that might be of convenience in the case, I wish you would try to do that and try to make arrangements in this particular case to have necessary typographical assistance until the job is completed on this day. The Court is recessed until 1:15 o'clock this afternoon, at which time we will resume this hearing.

(Whereupon the Court recessed at 12:00 o'clock noon and reconvened at 1:15 p.m., at which time the following occurred.)

The Court: I wish to resume the hearing in [22] Cause No. 48570. May the record show that all counsel are present and all parties are present and represented?

Mr. Harris: Yes, your Honor.

Mr. Spiller: Yes, sir.

The Court: You may proceed, Mr. Toulouse, with your statement.

Mr. Toulouse: Your Honor, I have fairly well completed my remarks with respect to Mr. Felton, Mr. Stepich, Mr. DePierris and Mr. Hopkins. I would now like to say something with respect to Mr. Desimone. As related by Mr. Stewart and as I recast the facts as I know them to be, the Court has before it in Mr. Desimone a man who comes of a good family, who is now 49 years old. I think the report will further disclose, although Mr. Stewart has not alluded to it, that Mr. Desimone is not a well man. He is a man that has a heart condition. I think he has some background of diabetis. So here we have a man that is well beyond the middle span.

The Court: If he feels ill at this time, be sure to let him sit down.

Mr. Toulouse: Oh, I will, your Honor. We have a man that is married, who has had the one wife, one child. It is not alluded to but apparently Mr. Stewart has stated what a fine family he comes from. It might also be stated that his child is certainly a credit to [23] society. She is a girl who graduated with honors from the University. It might also be said if we viewed Mr. Desimone's life from 1935 or 1936, taken as a whole, it is a picture of a man come from a good Italian family; that for some reason or other he is like the strayed or lost sheep. He has strayed in this sense of the word—that he has found himself in a business, the tavern business, which was a circumstance—and I say a circumstance advisedly—from which all these pro-

ceedings and other proceedings have flowed. In short, it was the occasion that brought about the offenses that he has committed against the law, all more or less having to do with operating a tavern or operating a business that had pin ball machines or being connected with a business that bought or sold spiritous liquor.

Now, I say this to your Honor, that in this country as it exists today under the law, since the passage of the 18th Amendment, apparently buying and selling, storing or drinking whisky is condoned by the Legislature of the United States. Men like Mr. Desimone got into the business and they, I might say, must have become involved in politics one way or the other. I think the evidence shows that ultimately Mr. Desimone's enterprise out here was taken over by the Brooks Realty Company in a foreclosure proceeding in King County. [24]

Mr. Desimone right now is a man that is crowding 50 years old. He is ashamed of the fact that he spent the larger portion of his life trying to maintain himself in a position in society by running this type of business; that he got himself involved with real estate men, politicians, perhaps others, that put him where he is now—walking horses out on the race track for a living, cooling them off as it were. I am convinced that had this same man stayed within the fold of his family and the business that he knows something about, running or helping to run the public market, that he wouldn't be before this Court today.

It is the occasion of sin that brings about sin.

It is the occasion or the circumstance of being connected with taverns, pinball machines, etc., and perhaps that has brought about the position that he finds himself in before this Court today.

The Court will note from his record, and I say this advisedly, that there is nothing in his record that speaks of any type of a crime of a moral nature, and that interests me. In other words, there is not one word in that entire record, which involves a lot of offenses of omission primarily, that indicates that the man ever had an amoral bent.

I could say that amongst many he has been [25] regarded when he had money as generous, as kind, and as charitable. There are many in this community that have profited, from boys clubs on down, by reason of his goodness of heart and his charity. I think that if the Court, consonant with its obligation to have people respect the laws of the United States and comply with them, could find it within its heart and within the ambit of clemency, which I consider to be the greatest of all judicial virtues, to send this man back into the bosom of his family, perhaps under some sort of a suspended sentence or probation to his brother who is here in Court today, I think this Court should do so. I think that under those circumstances the occasion of this man's offenses has been removed. Time has removed them. Time sometimes cures all ills. He no longer has any gambling machines, and as your Honor knows they are expensive things. He no longer has any money. He no longer has any business. He no longer has any taverns, and he hasn't had them for some pe-

riod of time. Almost two years have elapsed since he was indicted on the particular offense in question. He has stayed in attendance on this Court. He has certainly been faithful, from the standpoint that he can be faithful, to incur the respect of men such as Mr. Stepich, Mr. Hopkins, Mr. Felton and Mr. DePierris, that is honorably he has stood up to the position that it was his duty [26] as a man to say it was his individual responsibility and not theirs that brought about the circumstances in which they find themselves. Certainly there is not too much to say of a man who can face up to an obligation to his fellow men. That likewise is a tribute to a virtue that inheres in Mr. Desimone. I can't think of any greater virtue that a man can have than to be frank, honest, and candid beside those people that he feels obligated to, that he has placed in a position of jeopardy, and to be honest about it. It is a virtue that I admire.

I repeat that I think that this Court could in justice and in clemency permit Mr. Desimone to be restored to the bosom of his family under some sort of a probationary arrangement. He has no funds to speak of. Perhaps some sort of a fine which could be paid over a period of time might be worked out to insure his good conduct and his respect for the law. I do think that it would be a sin and a shame not to permit this strayed sheep to be given an opportunity to rehabilitate himself. He stayed within that framework as I say for almost two years.

It is too much to expect that all of these defendants since they have conducted themselves as this

Court might very well believe from all of the evidence [27] and from Mr. Stewart's report, in a manner that is consonant with the spirit of real citizenship, is it too much to expect that on a probationary sentence of some sort that all five of these men would not continue to do so? In my judgment, the best interests of the United States would be subserved by certainly compensating the United States to the extent of the expense it has been put to in this matter; that the interests of society are best subserved by permitting these men, who are not malefactors from the standpoint of moral considerations, to be restored to the bosoms of their families; and that some sort of a suspended sentence would be all that the law should require until one or more of them might evidence an amoral tendency of some sort or other.

I respectfully plead to the Court for clemency for these five men, and in doing so, I am speaking from my heart, not necessarily logically but from the depths of my heart. That is all, your Honor.

The Court: Mr. Spiller, do you wish to say something?

Mr. Spiller: I don't think I can add anything to what Mr. Toulouse has said, if the Court please.

The Court: I wish each of the defendants to know the Court would welcome anything you may wish to say, and I want to remind you that so far as I know [28] this will be the last opportunity we will have to discuss your cases together. This Court does not receive private communications about cases before or after trial, and I wish you to have that in

mind and to know that the Court will welcome any statements you may wish to make; if you ever will wish to make any statements, I want to hear them now, because this is the time when the Court earnestly will consider anything that any one of you may wish to say. Also, if any member of your family might wish to make a statement, I will likewise earnestly consider any such statement.

Mr. Desimone?

Mr. Richard Desimone: I am Richard Desimone, Pete's brother. Our family knows that Pete has strayed and hasn't been a leading citizen of Seattle, but we also feel that he hasn't committed a big crime or a crime against society that would prohibit him from becoming a useful citizen again. The family would like to welcome him back, and we stand ready to help him financially or any other way possible.

The Court: Does any one else wish to make any statement for any one of the defendants? I will hear from Mr. Peter Desimone now if he wishes to make any statement in his own behalf.

Mr. Peter Desimone: I have nothing to say. [29]

The Court: Any one else?

Mr. Stepich: I have never knowingly, wilfully, or intentionally tried to conspire against the United States Government. I have a wife and family and a business. I know you judge me as it is. I would appreciate your consideration. Thank you, very much.

The Court: Mr. Hopkins, did you wish to say anything?

Mr. Hopkins: Your Honor, I am in accord with

Mr. Stepich. I did not intentionally or any other way try to defraud the Government, and I leave it at your mercy, sir.

The Court: Mr. Felton?

Mr. Felton: No, sir.

The Court: Mr. DePierris?

Mr. DePierris: No, sir.

The Court: Is there any member of the family or a friend or relative of any one of the defendants who might wish to make a statement?

(No answer.)

The Court: It is the judgment **and** sentence of the Court that you and each of you, the defendants, Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris are guilty as charged in Count I of this indictment against you, that being the only count [30] in the indictment, and that in respect to that count each of you is convicted.

It is the further judgment and sentence of the Court that you, the defendant, Peter Desimone, be committed to the custody of the Attorney General of the United States for confinement in the United States Penitentiary at McNeil Island or such other like institution as the Attorney General or his authorized representative may by law designate for the period of eighteen months. There will be no fine in connection with Mr. Desimone's sentence.

What the Court has just said and what the Court will say as to the sentence as to each defendant is to be related to Count I, that being the only count in

the indictment. I wish the written form of the judgment and sentence to so show.

It is the the judgment and sentence of the Court that you, the defendant, John Stepich, be committed to the Custody of the Attorney General of the United States for confinement in the King County Jail or such other like institution as the Attorney General or his authorized representative may by law designate for the period of fifteen days and, further, that you pay a fine to the United States in the sum of Fifteen Hundred Dollars and stand committed until that fine is paid. [31]

It is the judgment and sentence of the Court that you, the defendant, Harold Hopkins, be committed to the custody of the Attorney General of the United States for confinement in the King County Jail or such other like institution as the Attorney General of the United States may by law designate for the period of fifteen days and, further, that you pay a fine to the United States in the sum of Twelve Hundred Dollars and stand committed until that fine is paid.

As to the defendant, Russell W. Felton, it is the judgment and sentence of the Court that you be committed to the custody of the Attorney General of the United States for confinement in the King County Jail or such other like institution as the Attorney General of the United States or his lawfully appointed representative may by law designate for the period of thirty days, provided, however, that execution of this sentence be suspended and the defendant be placed on probation for the period of

one year, upon the conditions that during that time you do not violate any law of the United States or of any state or community where you may be; that you do not unlawfully possess, handle or dispose of any sort of intoxicating liquors; that you comply with all the terms and conditions of the United States statute relating to probation and make reports to the [32] probation officer as required by him.

As to the defendant, Bert DePierris, it is the judgment and sentence of the Court that you, the said defendant, be committed to the custody of the Attorney General of the United States for confinement in the King County Jail or such other like institution as the Attorney General or his authorized representative may by law designate for the period of sixty days, provided, however, that the execution of this sentence shall be suspended and you be placed on probation for the period of two years upon the conditions that you, during that time, do not break any laws of the United States or of any state or community where you may be; that you do not unlawfully possess, handle or dispose of intoxicating liquors in any form; and that you further comply with all the terms and conditions of the United States statute relating to probation and make reports to the probation officer as required by him.

Is there any issue in this case not now disposed of by the orally announced judgment and sentence of the Court and by the other rulings preceding such oral announcement?

Mr. Toulouse: Your Honor, there is one thing. On this fine of \$1,500.00, I am not quite clear on Mr. Stepich and Mr. Hopkins, their fines, is your Honor going [33] to fix a time within which that would have to be paid?

The Court: I wish it paid right away. It will have to be paid and thereafter the Court's approval should be obtained before they are released from the Marshal's custody.

Are there any other matters now?

Mr. Spiller: May I make a request of the Court in this connection? Would it be possible to talk with these defendants for a few moments in the Attorneys' Room before they are taken into custody?

The Court: No. That request is denied. You may discuss any matters with them after they are taken into custody.

How much time will you need, Mr. Harris?

Mr. Harris: I would assume by 3:00 or 3:15 we might very well have all these completed by then.

The Court: I think that is a little bit early, Mr. Harris. I think the Court should excuse counsel until 4:00 o'clock, and the Court will do that.

I want to discuss one point with counsel and these defendants about the matter of paying the fine. The Court would have no objections, if they can make some reasonable assurances and arrangements, to their paying of their fines within six months. I have no objection to the giving of six months' time within which to [34] pay the fines.

Mr. Harris: I have no objection either, your Honor.

The Court: Then I wish you would state that. If at any time before the termination of execution by the defendant, Mr. Stepich, and the defendant, Mr. Hopkins, they appear in Court and make reasonable assurances then and there to the Court that they can pay the fine within six months, thereupon the Court will modify this sentence as to the requirement that they stand committed until the fine is paid. Pending their appearance and explanation satisfactory to the Court, they will be subject to the order to stand committed until the fine is paid.

Mr. Harris: Does your Honor wish that language incorporated in the judgment itself?

The Court: I doubt the necessity of it, but I will say to them orally the Court will consider modifying the sentence to that extent if they will do that.

Mr. Toulouse: That is understood, your Honor.

The Court: The written form of the judgment and sentence will not have that explanation or that detail, but I say on the record if, before the time is ended during which they are required to serve a sentence, they appear in Court—and I ask the Marshal to assist [35] them in appearing in Court—and can assure the Court in some reasonable way of an arrangement to pay the fines within six months thereafter, the Court will approve of a modification and will modify the written form of the judgment and sentence so as to permit them to do that.

Mr. Toulouse: Your Honor, I have one more question. I have advised the defendants with re-

spect to the law relating to appeals to the Ninth Circuit Court of Appeals, and I was wondering what your Honor's attitude is with respect to the period. There is a ten-day period apparently in which to give notice of appeal. Would your Honor permit these individuals to be at large during that ten-day period?

The Court: No. The order now is that each of the defendants as to whom no suspension of execution was ordered be now remanded to the Marshal for delivery into the custody of the Attorney General for execution of sentence. I think there is a rule that would apply to the situation about their intentions, certain intentions to appeal. If they give notice of appeal, the Court will upon request thereafter, but not until then, discuss the matter of supersedeas and appeal bond.

Is there anything else in this connection? Then the defendants Desimone, Stepich and Hopkins are [36] now remanded to the Marshal for delivery into the custody of the Attorney General for execution of sentence. The defendants Felton and De Pierris will be subject to suspension of execution upon the conditions stated, and they are not remanded. They are excused until 4:00 o'clock. Likewise those who are remanded are excused until 4:00 o'clock. All counsel are excused until 4:00 o'clock. It is necessary that all counsel be present as well as all defendants at that time. They may now be excused.

(At this time proceedings were recessed until 4:00 o'clock p.m. this day, at which time the following occurred.)

The Court: You may proceed now, Mr. Harris.

Mr. Harris: Yes, your Honor.

The Court: Counsel, will you have the defendants in the Desimone case all come forward?

(All counsel and all defendants come forward.)

Mr. Harris: For your Honor's consideration, I am first submitting to the Court the judgment and sentence as applied to Peter Desimone.

The Court: Have counsel had a chance to look this over?

Mr. Toulouse: We have, your Honor.

Mr. Spiller: Yes, your Honor. [37]

The Court: Do you see any errors or omissions in it?

Mr. Spiller: We have noticed none, your Honor.

Mr. Toulouse: We find none.

The Court: Does anyone know of any legal reason or any other reason that amounts to a legal reason why these judgments and sentences should not be entered now in their written form?

Having in mind what has already been heard and said and considered, and not hearing anything to the contrary now, the Court does order that this judgment and sentence and order of commitment as to the defendant Peter Desimone be now entered and that defendant, in accordance therewith, be remanded to the Marshal for delivery into the custody of the Attorney General for execution of sentence.

Mr. Harris: Now, handing you the judgment in reference to John Stepich—

The Court: Are there any errors or omissions in that?

Mr. Toulouse: None, your Honor.

Mr. Spiller: None, your Honor.

The Court: I have put a stroke below the first two letters in the word "stand" at the end of line 5 on the second page. There was an [38] unintentional spacing between the two letters. This will indicate drawing them together in the same word.

Mr. Spiller: No objection to that, your Honor.

The Court: In that case as to the defendant John Stepich, let this judgment and sentence and order of commitment in written form be now entered and the defendant remanded to the Marshal for delivery into the custody of the Attorney General for execution of sentence.

Mr. Harris: Handing to the Court for its consideration the judgment and sentence for Harold Hopkins—

The Court: In that case, as to the defendant Harold Hopkins, let the judgment and sentence in written form carrying into effect the Court's previous oral ruling be now entered, whereby that defendant is remanded to the marshal for delivery into the custody of the Attorney General for execution of sentence.

Mr. Harris: At this time I hand the Court for its consideration the judgment and sentence of Russell W. Felton. I would like to call to your Honor's attention that on page 2, line 8, we have inserted the word "any" after the word "in" and before the word "form."

The Court: Does anyone have any doubt that “any form” relates to the intoxicating liquor?

Mr. Spiller: Well, I just want to be sure that the word “unlawfully” is before that. Yes, I think it is. [39] I think that is all right.

The Court: Has anyone any objection as to the length of the probationary period of one year? Does anyone conceive of any illegality in that period?

Mr. Spiller: I know of none, if the Court please.

The Court: Hearing none, this judgment, sentence, order of suspension of execution thereof, and order of probation will now be entered, and the defendant, in pursuance thereof, is now discharged from the Marshal’s custody upon the terms and conditions of said order of probation and order of suspension of execution of sentence. The defendant Russell W. Felton’s bond is discharged and his bondsman exonerated, and he may go hence without *day* subject, however, to the conditions of that probation order and suspension of execution order.

Mr. Harris: Now handing to the Court for its consideration the judgment, sentence and order of probation of the defendant Bert DePierris——

The Court: Has anyone any legal or factual objection to the period of two years as the proper and legal period of probation in this case as to this defendant?

Mr. Toulouse: I know of none. [40]

Mr. Spiller: I know of none.

Mr. Harris: No, sir.

The Court: In this case, subject to the terms

and conditions of the order of suspension of execution of sentence and order of probation, let this judgment, sentence and order of probation be entered and the defendant is discharged from the Marshal's custody and his bond and bondsman are discharged.

Now, is there anything else as to any other thing in this case at this time?

Mr. Harris: No, your Honor.

Mr. Spiller: If the Court please, may I give a notice of appeal on behalf of all of the defendants? I would like to serve Mr. Harris, as United States Attorney, with a copy of that, and I would like to ask the Court, if you will, to fix an amount of bond by way of supersedeas or otherwise, pending the filing and completion of the appeal.

The Court: Mr. Harris, are you prepared to respond as to what the Government thinks the amount should be of the bond?

Mr. Harris: Yes. I think at this time that the Government would not oppose a bond in the amount—as to some of the defendants it would have to vary.

The Court: Do counsel wish to have a short [41] conference and then advise the Court?

Mr. Toulouse: Thank you, your Honor.

Mr. Spiller: Thank you, your Honor.

The Court: Very well. Counsel and the defendants may step aside temporarily.

Do you wish the notice of appeal to be now filed?

Mr. Spiller: Yes.

The Court: It will be filed.

(Recess.)

The Court: Are you ready to proceed?

Mr. Harris: Yes, your Honor.

The Court: What would you like to say about the bond, gentlemen?

Mr. Harris: Possibly I should speak first. My understanding is that the defendants prior to the trial and prior to the sentence today were on bond in the amount of \$500.00. The Government would take this position, in view of the sentences imposed, that the bond should not be substantially increased except as far as the defendant Peter Desimone is concerned, and the Government would recommend an amount in the proximate sum of \$2500.00.

The Court: Would other counsel like to make a statement?

Mr. Toulouse: The only remark I would make in [42] that regard, your Honor, is that Mr. Desimone has been in attendance upon this Court for a period of two years on a \$500.00 bond. Considering the circumstances of the case and in the light of what Mr. Harris has said, there certainly would be no reason for this Court increasing the bond beyond \$1,000.00 in my judgment. Mr. Desimone's family ties are here. He has been in attendance upon this Court for nearly two years. There is no reason for the Court to believe that he wouldn't respond.

The Court: Sometimes it changes one's attitude in respect to those considerations you are mention-

ing when the impact of the final disposition of the case comes.

Do you wish to say something, Mr. Spiller?

Mr. Spiller: No. I think not.

The Court: I believe, considering the cost of the bond and all that has been said on this occasion, also during the trial and before the trial, the Court ought to fix the bond in the sum of \$2,000.00 as to the defendant Desimone, and that is the order of the Court, \$2,000.00 bond, surety or cash—that is commercial surety or cash bond.

As to the others, the Court will not make any ruling increasing the bond in view of the fact that the Government does not request it. [43]

Mr. Harris: The present bond will not suffice, though, as I understand it, and a new bond will have to be issued.

The Court: There is no question in my mind about that. There will have to be a new bond in each case.

Mr. Spiller: May I ask one question? Does the Court fix the bond at \$500.00, also, for the two men as to whom there was a suspension and probation?

The Court: If it is requested that a bond be fixed, the answer, of course, is yes.

Mr. Spiller: Is there a request for a bond for them in view of the fact——

The Court: Yes. The Court makes that order whether there is a request for it or not and under the same conditions. It will be either a commercial surety bond or a cash bond in each instance, and as to the defendants Stepich, Hopkins, Felton and

DePierris, the amount of the appeal bond is fixed in the sum of \$500.00.

Unless there is something to the contrary, my understanding at this time is that the United States Commissioner has authority to approve appeal bonds, is that true?

Mr. Harris: That is my understanding.

The Court: If counsel will show the Court [44] some different authority, I will consider what counsel may say, but I wish the Commissioner to attend to all bond approving unless there is some reason why he should not.

Is there anything else to be said?

Mr. Harris: We have this problem, your Honor—and frankly I can't answer the Marshal—as to Felton and DePierris. In view of the fact that they have filed notice of appeal and your Honor set the bond at \$500.00 they are remanded to the custody of the Marshal until they have posted that bond. At least that is my understanding.

The Court: They cannot just stay out if they are dissatisfied with it. They ought to be remanded.

Mr. Harris: That is correct.

The Court: In view of the notice of appeal each of the defendants, including Felton and DePierris, is remanded to the Marshal.

The Court is now adjourned until tomorrow morning at 10:00 o'clock.

(At this time there was a short recess, after which the following occurred.)

Mr. Spiller: May I say to the Court that Mr. DePierris and Mr. Felton have asked counsel

whether they could withdraw their appeal in view of the remanding into custody? [45]

The Court: Will they come forward and will counsel for them and Government counsel come forward?

(All counsel and the defendants Felton and DePierris come forward.)

The Court: Mr. Harris, do you know how to effectually withdraw an appeal after a notice of appeal has been given?

Mr. Harris: I understand, your Honor, that the notice of appeal has not been completed as yet because of not having paid the \$5.00 filing fee. I have had this occur before. It has not been docketed.

The Court: I understand this has not been docketed here.

Mr. Spiller: That is what I understand.

The Court: Then there is nothing to keep the Court from ordering its return from the files and that the Clerk not docket it.

Mr. Harris: I wouldn't think so, your Honor.

The Court: I ask, Mr. DePierris, if you wish to withdraw your notice of appeal in this case as counsel has said you do?

Mr. DePierris: Yes, sir.

The Court: Do you wish to withdraw this notice so far as it concerns you and destroy it as having no effect? [46]

Mr. DePierris: Yes, sir.

The Court: I ask Mr. Felton, having heard what your counsel has said, did he correctly represent your wishes?

Mr. Felton: Yes, sir, he did.

The Court: And do you wish to withdraw this notice of appeal and to destroy it and to treat it as having no effect whatsoever?

Mr. Felton: Yes, sir.

The Court: Is this the voluntary wish of Mr. DePierris and Mr. Felton?

Mr. DePierris: Yes, sir.

Mr. Felton: Yes, sir.

The Court: In view of the fact that it has not been docketed and no fee has been paid to the Clerk here, is there any objection on the part of counsel?

Mr. Harris: No, your Honor.

Mr. Toulouse: No objection.

Mr. Spiller: No objection.

The Court: Very well. It will be done, and, Mr. Clerk, will you destroy that now?

Mr. Harris: I understand from Mr. Toulouse he would like to make a change, your Honor, which I believe would be in conformity with their thoughts.

The Court: Let Mr. Toulouse do that then, [47] and will counsel be present, Mr. Harris?

Mr. Harris: Yes, your Honor.

The Court: I think you should eliminate these two persons in the caption of the case, these two defendants, if that is their wish and I understand it to be their wish, the two persons DePierris and Felton.

Mr. Toulouse: I have done so now, your Honor.

The Court: Will all counsel initial that?

(All counsel write on document.)

The Court: This now may be accepted and filed and proceeded with as a notice of appeal on behalf of the defendants Peter Desimone, John Stepich and Harold Hopkins, and only on their behalf, and not as a notice of appeal on behalf of the defendants Felton and DePierris; is that the understanding of all?

Mr. Toulouse: Yes.

The Court: Then the defendants Felton and De Pierris are discharged as the Court previously, in the first instance, stated. What the Court said later to the contrary is set aside and is held for naught in view of what has later transpired.

You may step aside. The Court then is again adjourned.

(Whereupon the Court adjourned at 5:10 p.m. Monday, May 17, 1954.) [48]

Certificate

I, Frances I. Gilligan, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ FRANCES I. GILLIGAN.

[Endorsed]: Filed June 4, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 39 (b) (1) of the Federal Rules of Criminal Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, excluding exhibits, and that said papers constitute the record on appeal of defendants Peter Desimone, John Stepich and Harold Hopkins from the judgments and sentences filed May 17, 1954, to the United States Court of Appeals for the Ninth Circuit, said papers being identified as follows:

1. Indictment, filed Sept. 26, 1952.
2. Marshal's Return on Bench Warrant, Desimone, filed 10-7-52.
3. Marshal's Return on Bench Warrant, Hopkins, filed 10-7-52.
4. Marshal's Return on Bench Warrant, Stepich, filed 10-7-52.
5. Bail Bond, Deft. Desimone (Nat. Auto. & Cas. Ins. Co.), filed 10-7-52.

6. Bail Bond, Deft. Stepich (Nat. Auto. & Cas. Ins. Co.), filed 10-7-52.
7. Bail Bond, Deft. Hopkins (Nat. Auto. & Cas. Ins. Co.), filed 10-7-52.
8. Marshal's Return on Bench Warrant, Felton, filed 10-10-52.
9. Bail Bond, Deft. Felton (Nat. Auto. & Cas. Ins. Co.), filed 10-10-52.
10. Marshal's Return on Bench Warrant, De Pierris, filed 10-10-52.
11. Bail Bond, Deft. DePierris (Nat. Auto. & Cas. Ins. Co.), filed 10-10-52.
12. Bill of Particulars, Motion for by Defendants, filed 11-21-52.
13. Motion Defts. to Strike and to Dismiss, filed 11-24-52.
14. Motion Defts. to Suppress Evidence, filed 12-6-52.
15. Filed Motion Defendants for Continuance, filed 12-12-52.
16. Filed Withdrawal of Attorneys, May 1, 1953.
17. Praecipe, Govt. for Subpoenas, Schwier, et al., filed 4-6-54.
18. Praecipe, Govt. for Subpoenas, Huntley and Kidd, filed 4-6-54.
19. Praecipe, Govt. for Subpoenas, Ballack, et al., filed 4-6-54.
20. Praecipe, Govt. for Subpoenas, West and Turner, filed 4-6-54.
21. Marshal's Return on Subpoenas, Turner, et al., filed 4-8-54.

22. Praecipe, Govt. for Subpoena, Burdick, filed 4-8-54.

23. Marshal's Return on Subpoena, Kidd, filed 4-9-54.

24. Marshal's Return on Subpoena, filed 4-9-54.

25. Praecipe, Govt. for Subpoena, Nicolai, filed 4-21-54.

25-A. Stipulation Waiving Trial by Jury, filed 4-21-54.

26. Praecipe, Govt. for Subpoena, Riddell, filed 4-21-54.

26-A. Motion Defts. for Dismissal, filed 4-21-54.

27. Marshal's Return on Subpoena, Ballack (Unexecuted), filed 4-22-54.

28. Marshal's Return on Subpoena, Whittall, filed 4-22-54.

29. Marshal's Return on Subpoena, Riddell, filed 4-22-54.

30. Marshal's Return on Subpoena, Nicolai, filed 4-23-54.

31. Motion Defts. to Extend Time for Settlement and Signing of Special Findings of Fact and Sentence, filed 5-3-54.

32. Transcript of Proceedings at Trial, filed 5-11-54.

33. Request for Special Findings of Fact by Defendants, filed 5-17-54.

34. Special Findings of Fact, filed 5-17-54.

35. General Finding and Special Findings of Fact, filed 5-17-54.

36. Judgment and Sentence and Commitment, Desimone, filed 5-17-54.

37. Judgment, Sentence and Commitment, Stepich, filed 5-17-54.

38. Judgment, Sentence and Commitment, Hopkins, filed 5-17-54.

39. Judgment, Sentence and Order of Probation. Felton, filed 5-17-54.

40. Judgment, Sentence and Order of Probation, DePierris, filed 5-17-54.

41. Notice of Appeal of Defendants Desimone, Stepich and Hopkins, filed May 17, 1954.

42. Bond on Appeal, Deft. Desimone (Nat. Auto & Cas. Inc. Co.), \$2,000.00, filed 5-18-54.

43. Bond on Appeal, Deft. Stepich (Nat. Auto & Cas. Ins. Co.), \$500.00, filed May 18, 1954.

44. Bond on Appeal, Deft. Hopkins (Nat. Auto & Cas. Ins. Co.), \$500.00, filed May 18, 1954.

45. Amended Notice of Appeal, Defendants Desimone, Stepich and Hopkins, filed May 26, 1954.

46. Court Reporter's Transcript of Judgment and Sentence, Hearing, filed June 4, 1954.

47. Marshal's Return on Subpoena, Booth (unexecuted), filed 6-14-54.

I further certify the following to be a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of appellants for preparation of the record on appeal in this cause, to wit:

Notice of Appeal (Joint Notice), \$5.00, and that said fee has been paid to me by attorneys for the defendants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 16th day of June, 1954.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14398. United States Court of Appeals for the Ninth Circuit. Peter Desimone, John Stepich and Harold Hopkins, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed June 18, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Agreed and Stipulated by and between counsel of record in the above-entitled cause that an order may be entered directing the Clerk of this court to transmit to the Court of Appeals for the Ninth Circuit with the record in the above-entitled cause, the original of plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, and 6, and defendants' Exhibit A-1, and substitution of attorneys and appearance of substituted counsel.

Dated this 25th day of June, 1954.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ LEONARD WEAVER,
Assistant United States Attorney, Attorneys for
Plaintiff.

/s/ MAX R. NICOLAI,
Attorney for Defendants-Appellants Peter Desi-
mone, John Stepich and Harold Hopkins.

ORDER

It is so ordered.

Done in Open Court this 25th day of June, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed June 25, 1954.

United States Court of Appeals
for the Ninth Circuit

No. 14,398

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PETER DESIMONE, JOHN STEPICH, and
HAROLD HOPKINS,

Defendants-Appellants.

APPELLANTS' STATEMENT OF POINTS ON
WHICH THEY INTEND TO RELY ON
THE APPEAL AND APPELLANTS' DES-
IGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to rule 17(6) of this court, appellants state that the points on which they intend to rely are:

1. That the indictment does not state facts sufficient to constitute an offense against the United States in accordance with the provisions of Title 18, U.S.C., Sec. 371, and Title 26, U.S.C., Sec. 3253, in that the indictment is vague, uncertain, indefinite, ambiguous, and fails to advise the defendants with certainty of the crime with which they are being charged, and that because of these alleged defects, the trial court should have granted defendants' motion for dismissal of the indictment.

2. That the trial court erred in failing to grant

defendants' motion for dismissal at the conclusions of the government's case on the ground that there exists a total failure of proof establishing the crime attempted to be charged by the indictment, to wit: Conspiracy, with reference to any of the appellants. That there is a total lack of proof as to the existence of an agreement between the defendants with reference to the alleged conspiracy to violate Title 26, U.S.C., Sec. 3253.

3. That the trial court erred in admitting over proper objections plaintiff's exhibits 1, 2, 3, 4 and 5, and that the trial court erred in refusing to grant defendants' motion to strike these exhibits on the ground that the same are incompetent, irrelevant, immaterial and not binding on the defendants whose names do not appear thereon and the respective signatures on such exhibits were not proven and identified as being the signatures of any of the respective defendants and on the further ground that these exhibits constitute hearsay against the defendants whose purported signatures do not appear on such exhibits, and for the reason that these exhibits were not properly authenticated and that no authority exists for the admission of said exhibits pursuant to Title 28, U.S.C., Sec. 1733, or any other statute or common law rule of evidence. That without the admission of these exhibits there is no evidence whatsoever in the record upon which it would be possible to find the appellants guilty of conspiracy to violate Title 26, U.S.C., Sec. 3253.

4. That the trial court erred in failing to grant

defendants' motion for acquittal at the conclusion of all of the testimony on the ground of insufficiency of evidence to prove the crime charged beyond a reasonable doubt.

5. That the trial court erred in failing to grant defendants' request for specific findings of fact pursuant to Rule 23, Federal Rules of Criminal Procedure, and that the trial court erred in entering general findings and special findings not supported by the evidence and in refusing to sign the special findings of fact submitted by the defendants although such findings are supported by the evidence in the record.

6. That the trial court erred in pronouncing judgment and sentence against the appellants for the reasons given under points 1, 2 and 3 herein principally on the ground that the indictment does not state a crime, and that there was a total lack of evidence to prove an agreement to conspire on the part of these appealing defendants, particularly if the inadmissible evidence referred to under point 3 hereof be not taken into consideration.

Pursuant to Rule 17(6) of this court and pursuant to Rule 39(b)(1) of the Federal Rules of Criminal Procedure, the appellants above named hereby designate as the contents of the record on appeal the complete record and all the proceedings and evidence in the above-entitled action. Appellants designate the parts of the record hereinafter listed and detailed as being all of the record material to the consideration of this appeal, namely:

1. Indictment, filed Sept. 26, 1952.
2. Bill of Particulars, Motion for by Defendants, filed 11-21-52.
3. Motion, Defts., to Strike and to Dismiss, filed 11-24-52.
4. Motion, Defts., to Suppress Evidence, filed 12-6-52.
5. Stipulation Waiving Trial by Jury, filed 4-21-54.
6. Motion, Defts., for Dismissal, filed 4-21-54.
7. Motion, Defts., to Extend Time for Settlement and Signing of Special Findings of Fact and Sentence, filed 5-3-54.
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10. Special Findings of Fact, filed 5-17-54.
11. General Finding and Special Findings of Fact, filed 5-17-54.
12. Judgment and Sentence and Commitment, Desimone, filed 5-17-54.
13. Judgment, Sentence and Commitment, Stepich, filed 5-17-54.
14. Judgment, Sentence and Commitment, Hopkins, filed 5-17-54.
15. Judgment, Sentence and Order of Probation, Felton, filed 5-17-54.
16. Judgment, Sentence and Order of Probation, DePierris, filed 5-17-54.
17. Notice of Appeal of Defendants Desimone, Stepich and Hopkins, filed May 17, 1954.

18. Bond on Appeal, Deft. Desimone, Nat. Auto & Cas. Ins. Co. (\$2,000.00), filed 5-18-54.
19. Bond on Appeal., Deft. Stepich (Nat. Auto & Cas. Ins. Co.), \$500.00, filed May 18, 1954.
20. Bond on Appeal, Deft. Hopkins (Nat. Auto & Cas. Ins. Co.), \$500.00, filed May 18, 1954.
21. Amended Notice of Appeal, Defendants Desimone, Stepich and Hopkins, filed May 26, 1954.
22. Court Reporter's Transcript of Judgment and Sentence Hearing, filed June 4, 1954.
23. Stipulation and Order Transmitting Original Exhibits, filed June 25, 1954.
24. Plaintiff Exhibits Nos. 1, 2, 3, 4, 5 and 6, and defendants' Exhibit A-1.
25. Appellants' Statement on Points on Which They Intend to Rely, and Designation of Contents of Record on Appeal.
26. Clerk's Certificate.

/s/ MAX R. NICOLAI,
Attorney for Appellants, Peter Desimone, John
Stepich and Harold Hopkins.

Copy received.

[Endorsed]: Filed July 23. 1954.

United States Court of Appeals
For the Ninth Circuit

PETER DESIMONE, JOHN STEPICH, HAROLD HOPKINS,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

MAX R. NICOLAI,
Attorney for Appellants.

400 New World Life Building,
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THE ARGUS PRESS, SEATTLE

FILED

NOV 29 1954

PAUL P. O'BRIEN,
CLERK

United States Court of Appeals
For the Ninth Circuit

PETER DESIMONE, JOHN STEPICH, HAROLD HOPKINS,
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United States Court of Appeals

For the Ninth Circuit

PETER DESIMONE, JOHN STEPICH, HAROLD HOPKINS,	<i>Appellants,</i>	} No. 14398
vs.		
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

JURISDICTION

The Grand Jury for the Western District of Washington, Northern Division, returned an indictment consisting of one count charging the appellants, Peter Desimone, John Stepich, Harold Hopkins, as well as one Russell W. Felton and one Bert DePierris with conspiracy (Title 18, U.S.C. Section 371) to violate the provisions of Title 26, U.S.C. Section 3253 rendering it illegal to carry on the business of retail liquor dealer and wilfully failing to pay a special tax required by law (R. 3). The indictment alleges that in furtherance of the conspiracy the defendants, using the name of White Center Athletic Club of which they were officers, took over a building and equipped the premises as a place for the sale of liquor at retail; that the defendants at various

1

[Italics, wherever used in this brief, are ours]

times between June 30, 1951, and May 8, 1952, stored liquor at the premises, and that the defendants, Felton and DePierris, sold whiskey by the glass (R. 4, 5). The defendants entered a plea of not guilty to the indictment. By stipulation (R. 10) all defendants waived trial by jury and the case was tried to the court. Prior to the trial, the defendants interposed a motion for the dismissal of the indictment (R. 11) on the ground that the same is vague, indefinite, and uncertain and ambiguous, and related to a nonexistent offense (R. 11, 12). The court denied the motion (R. 56).

At the conclusion of the government's case, the defendants moved to dismiss the indictment on the ground of insufficiency of the evidence (R. 222-232). The court denied the motion (R. 233). At the conclusion of the trial, defendants renewed their motion to dismiss the indictment on the ground of ambiguity (R. 336) and renewed their motion for acquittal on the ground of insufficiency of the evidence (R. 337). These motions were denied (R. 337).

After trial, counsel for defendants requested special Findings of Fact pursuant to Rule 23(c) of Federal Rules of Criminal Procedure (R. 14, 15). The court entered the General and Special Findings (R. 20-26) submitted by the United States District Attorney, and rejected those proposed by the defendants (R. 16-20). After trial the court rendered a memorandum decision (R. 337-340) finding all defendants guilty of the crime charged in the indictment and deciding that the government had proved all the overt acts charged, except the fifth one (R. 340).

The court subsequently sentenced all of the defendants as follows:

1. Peter Desimone to 18 months at McNeil Island (R. 369);
2. John Stepich to 15 days in the County Jail and a fine of \$1,500.00 (R 370);
3. Harold Hopkins to 15 days in the County Jail and a fine of \$1,200.00 (R. 370);
4. Russell W. Felton to 30 days in the County Jail suspended on probation for one year (R. 370);
5. Bert DePierris to 60 days in the County Jail suspended on probation for two years (R. 371).

After entry of judgment and sentence, the defendants, Peter Desimone, John Stepich and Harold Hopkins, gave timely notice of appeal (R. 37, 38, 45-47) in accordance with Rule 37 of Federal Rules of Criminal Procedure (Title 18, U.S.C.) and perfected the same in accordance with Rule 39 of Federal Rules of Criminal Procedure and the Rules of the Court of Appeals, Ninth Circuit.

STATEMENT OF THE CASE

In view of the fact that appellants' Statement of Points on which they intend to rely (R. 391, 392, 393—Points 2, 4, 5 and 6) relates to the insufficiency of the evidence to support the judgment and sentence, it will be necessary to set forth under this sub-heading the evidence in some detail.

The evidence shows that during the period covered by the indictment, the appellant, Peter Desimone, using the name White Center Athletic Club (R. 301, 302, 291), owned and operated certain premises consisting of a

quonset type structure (R. 88) fifty feet wide and 100 feet long (Dft. Ex. 1-A). Entering from the street, there was a lobby on the right side and an office and cloak room on the left. The main room consisted of a bar, and on the right wall there were numerous slot machines. The rest of the room was filled with tables and chairs where patrons would dine. On the back of the premises, there was a kitchen. The establishment was conducted mainly as a so-called bottle club (R. 125, 288, 309, 323) open only to members, who brought their own liquor which would be kept by the club to be dispensed by the bartenders for a service charge. The evidence shows that non-members had access to the premises and purchased liquor by the drink (R. 90-98, 114, 162, 185, 260, 266). During the period in question, the premises were raided repeatedly by officers of the Washington State Liquor Board and Deputy Sheriffs (R. 122-139; 144-149; 151-157). On the occasions of these raids, the defendants, Russell W. Felton (R. 122, 125, 136, 140) and Bert DePierris (R. 129, 136, 139), were found to have acted as bartenders, and the evidence establishes that on several occasions they sold liquor by the drink (R. 90, 91, 95, 96, 97, 264).

The chief of the Returns Processing Branch of the Internal Revenue Service of the Treasury Department of the United States for the District testified that the White Center Athletic Club did not have a Federal Retail Liquor Stamp for the period covered by the indictment (R. 83); that none of the defendants indicted had such a stamp; and that no application for such a stamp had been made by the club or any of the defendants and that the Federal Retail Liquor License Tax

(\$50.00 per annum—Title 26 U.S.C. Section 3250 (b) (1)) had not been paid by the club or any of the defendants (R. 83, 84).

The precise question involved on this appeal is whether the evidence establishes beyond a reasonable doubt the existence of a conspiracy between the defendants not to pay the \$50.00 occupation tax. Appellants therefore deem it necessary to set forth the pertinent evidence insofar as it might connect the *individual defendants* named or other persons with such a conspiracy.

With reference to Peter Desimone, the testimony shows the following:

1. He did not take the stand. Throughout the whole period involved he occupied the premises, and on occasion personally tended bar (R. 131, 147). He hired one Charlotte Fulford (R. 306) who worked on the premises during the whole period covered by the indictment. She helped in the office (R. 308), she provided change for patrons of the slot machines, she checked the clothes of patrons and their liquor (R. 308), she paid the bills and the employees in the absence of Mr. Desimone and had the combination to the office safe (R. 318). She also made out payroll sheets and received a salary of \$8.00 per day while working for the defendant, Desimone (R. 320). She never sold liquor herself (R. 322) but knew that liquor was being sold on the premises. Mr. Desimone hired and fired all help (R. 307, 306). Mr. Desimone was regarded as the owner of the club by his meat and produce supplier (R. 300-302). On February 4, 1952, upon a raid conducted by the Wash-

ington State Liquor Department, one of the inspectors inquired of him whether he had a Federal Retail Liquor Stamp and he admitted not having one (R. 134, 147).

2. With reference to Charlotte Fulford, the evidence establishes that she was an employee of the defendant Desimone (R. 306) during the period covered by the indictment. She was called as a witness for the defendants. With reference to the defendants, Hopkins and Stepich, she denied that either was employed by the club or had any business connection therewith (R. 307, 329). With reference to the defendant, Hopkins, she testified that his only connection with the club was as a member of the Lions Club. He would attend Monday night dinner meetings on the premises (R. 307). She testified that the only agreement she had with Mr. Desimone related to her employment (R. 320); that she never discussed with Mr. Desimone the question of presence or absence of Federal Retail Liquor Stamp (R. 320). She admitted that she overheard the discussion between the defendant, Desimone, and Washington State Liquor Board agents concerning such a stamp, and that the defendant, Desimone, told the officers that he didn't need a stamp because he was merely selling service (R. 321-322).

3. With reference to the defendant, John Stepich, the record shows the following: He did not testify at the trial. During the period covered by the indictment he was engaged as an insurance broker (R. 235, 297). His reputation as a citizen of good character was excellent (R. 235, 238, 240, 295, 298). He had no previous criminal record (R. 353). Patrick Burke, a deputy

sheriff for King County saw the defendant, Stepich, January 18, 1952, sitting at the bar, and renewed an old service acquaintanceship with him (R. 154). Harold E. Daggett, investigator for the Alcohol-Tobacco Tax Division of the Treasury Department, testified that on May 6, 1952, the defendant, Stepich, accompanied by Charlotte Fulford, permitted him to enter the premises (R. 185), and that during the early morning hours of the following day he sold him a roll of dimes to play the slot machines (R. 170, 175, 186). That upon checking of records he found that the defendant, Stepich, was president of the White Center Athletic Club in 1948 (R. 176).

4. With reference to the defendant, Hopkins, who did not take the stand, the testimony shows: That he operates a fish market (R. 241) and that his reputation for character and citizenship is very good (R. 238, 241, 243, 244, 332, 335). He has no previous criminal record (R. 353). On March 29, 1952, the defendant, Hopkins, verified an answer of the White Center Athletic Club as Secretary-Treasurer thereof (R. 59, 106; Pl's Ex. 1). During January, 1952, a member of an Orthopedic Guild wishing to arrange a dinner-dance at the White Center Athletic Club contacted the defendant, Hopkins, at the club premises and made arrangements for the dinner-dance. This person was advised by him that the members of the Guild could purchase drinks at the club. The dinner was held on February 29, 1952, on the club premises (R. 111, 112, 114). On February 4, 1952, this defendant was seen on the premises in the check room (R. 155). On that occasion, a film was being shown and the premises were being used by the local

Lions Club (R. 135) which had brought its own liquor and was having a stag party. One of the Washington State Liquor Inspectors testified that this defendant was tending the door on that evening (R. 131). The witness, Charlotte Fulford, testified that Hopkins was not employed by the club and never exercised any act of managership (R. 307). The defendants, Felton and DePieris, who worked as bartenders at the club at various times during the period from October, 1951, to May, 1952, likewise testified that their only contact with this defendant was as a club patron (R. 254, 268, 269, 279) particularly as a member of the Lions Club.

5. With reference to the defendant, Russell W. Felton, the testimony shows: He testified in his own behalf (R. 245-275). By occupation he is a bartender and had known the defendant, Desimone, since 1935 (R. 245). During June, 1951, Desimone asked him to work at the White Center Athletic Club. He was paid union scale wages and worked steadily until December, 1951, and thereafter occasionally at the club (R. 248-250). During May, 1952, he was fired by the defendant, Desimone (R. 251). He testified that to his knowledge the defendants, Hopkins and Stepich had no business connection whatsoever with the club (R. 252-254). He further testified that he had no agreement with anyone concerning the affairs of the club except that he had an agreement with the defendant, Desimone, to work there as a bartender (R. 256, 257). During 1951, he earned approximately \$1,000.00 while working at the club, and during 1952 he earned approximately \$100.00 (R. 272, 273). While working at the club, this defendant sold liquor by the drink in violation of the Steele Act for

which he was convicted on several occasions in Justice Court (R. 354). He testified that he was unaware of the necessity of the club having to obtain a Federal Retailer's Liquor Stamp (R. 255). He admitted that in October, 1951, during one of the raids conducted by the Washington State Liquor Board the subject matter of such a stamp had been mentioned (R. 125, 255). His lack of knowledge in this respect is fully corroborated by the testimony of the liquor inspector relating his conversation with this defendant concerning the FRLD Stamp (R. 125).

6. With reference to the defendant, Bert DePierris, the testimony presented at the trial shows the following: He testified in his own behalf (R. 275-292). He came to Seattle during December, 1951, and was employed by the defendant, Desimone, at the club as a part-time bartender from December, 1951, to May, 1952 (R. 276-277). During the period of his employment, he was paid union wages and earned approximately \$800.00 while working for the defendant, Desimone (R. 277, 276). He had known the defendant, Desimone, before the war while he had been working for a beer distributing firm (R. 278). He stated that he knew the defendants, Hopkins and Stepich, only as customers of the club, that he had no agreement with them concerning Federal Liquor Retailer's Stamp, and that he had no agreement concerning that stamp with the defendant, Desimone, or Charlotte Fulford or the defendant, Stepich (R. 280-282).

With the exception of the defendant, Desimone, he had not known any of the other defendants or the witness, Charlotte Fulford, before starting to work at the

club (R. 279). He had no financial interest in the club whatsoever and didn't know any of the officers or directors thereof (R. 281). While working at the club, he sold liquor by the drink in violation of the Steele Act and was convicted in Justice Court for these Violations (R. 283). He admitted that the matter of the Federal Liquor Retailer's Stamp was called to his attention by Washington State Liquor Enforcement Officers (R. 130, 139, 146, 286, 287) during January, 1952.

In addition to the testimonial evidence previously reviewed with reference to the defendants, Stepich and Hopkins, the trial court over objection admitted Pl.'s Exs. 2, 4 and 5 consisting of Application for Certificate of Registration of White Center Athletic Club purported to be signed by John Stepich as President and dated November, 1951, and excise tax returns of the club for September, 1951, to February, 1952, purported to be signed by Harold E. Hopkins as Secretary (Pl.'s Ex. 2). This exhibit was offered by the Government for the purpose of showing the address of the operation of the club, the date of such operation, *and the signature of the club officer and his position with the club* (R. 63). The witness identifying the records admitted that he was merely a field agent for the Washington State Tax Commission (R. 60) that he was not the custodian of the excise tax records (R. 64, 65) and that he could not identify the signatures on the Exhibit (R. 65, 69) or state whether the reports were genuine reports (R. 70). The defendants objected to the admissibility of Pl.'s Exhibit 2 on the ground of lack of proper foundation (R. 65) and later moved to strike the exhibit on the ground of in-

competency by reason of failure to have signatures identified and failure to establish authority of the purported officers for signing the reports (R. 190-193). The trial court denied the motion (R. 194). Defendants renewed their motion to strike this exhibit on the same grounds at the conclusion of the trial (R. 336).

Plaintiff's Exhibit 4, was introduced through the Chief of the Returns Processing Branch of the Internal Revenue Service, the official custodian of the records. The Exhibit consists of a reconciliation statement form W-3, the employer's quarterly tax return for quarter ending September, 1951, and an explanation for delinquency and employer's quarterly tax return for quarter ending December, 1951 (R. 80). The forms relate to the club and were the official records of the Department. They purport to be signed by one John Stepich and Harold Hopkins, respectively (R 81).

Exhibit 5, is a special tax return of the club relating to a coin-operated gaming device stamp for period from July 1, 1951, to June, 1952 (R. 82), purporting to contain the signature of Peter Desimone as Vice-President and Manager of the club.

The government witness admitted that he was not familiar with the signatures of the parties found on either Exhibits 4 or 5 (R. 85). At the conclusion of the government's case, the defendants moved to have Exhibits 4 and 5 stricken on the ground of incompetency because the government had failed to establish authority of anyone to execute the documents, and on ground of failure of proof establishing that the defendants named actually signed the exhibits (R. 196, 198, 199, 207). The

government sought to justify admission of these exhibits by relying on Federal Criminal Rule 27 and Title 28 U.S.C. Sections 1732 and 1733. The court reserved ruling on Exhibit 4 and denied defendants' motion with reference to Exhibit 5 (R. 206, 209, 222). Exception to the ruling was taken (R. 209). At the conclusion of the trial, these motions were renewed by defendants and again denied (R. 336, 337).

SPECIFICATION OF ERRORS

1. The trial court erred in failing to dismiss the indictment on defendants' motion to dismiss and for acquittal predicated on the ground that the indictment is uncertain, ambiguous and charges a non-existing crime (R. 11, 12, 13, 48-54, 336).

2. The trial court erred in admitting over objection Plaintiff's Exhibits 2, 4 and 5 and erred in failing to grant the defendants' motion to strike these exhibits. The exhibits consist of Washington State and federal tax returns. They were introduced to prove that the defendants, Desimone, Stepich and Hopkins, during the period from June 30, 1951 to May 8, 1952 were officers of the White Center Athletic Club, Inc., a corporation. Defendants objected to the admission of Plaintiff's Exhibit 2 as follows (R. 65) :

“MR. TOULOUSE: I object to the introduction on the ground that there is no foundation to show that these are the records of the State of Washington or that this man has had custody of these records since the period of time involved, that is since some time in 1951 and some time in 1952 or that they are in fact the reports of the White Center Athletic Club,

or for that matter, that they are relevant or material to any issue framed by this indictment.”

Defendants’ motion to strike Plaintiff’s Exhibit 2 was made as follows (R. 190, 191) :

“MR. TOULOUSE: The defendants likewise move to strike Plaintiff’s Exhibit 2 on the ground that it is incompetent, irrelevant and immaterial and, furthermore, that as to the defendants DePieris, Felton, Desimone and Hopkins, that the same is hearsay.

“Defendant—rather, Plaintiff’s Exhibit 2 is incompetent for the reason that it establishes nothing. It establishes that an application for a certificate of registration was made by a corporation purporting to be the White Center Athletic Club. It is purportedly signed by John F. Stepich. There is no evidence in the record to identify the John F. Stepich therein referred to as the John F. Stepich before this Court as a defendant. There is no evidence to support the proposition that John F. Stepich, that this is his signature. There is no evidence that the White Center Athletic Club authorized Mr. John F. Stepich to make the application. There is no evidence that John F. Stepich signed as president of the White Center Athletic Club or was in any way connected. On the face of the exhibit, it says ‘President’—you don’t know of what. The date of the exhibit? It doesn’t show the date that it was made.”

The motion to strike succeeding pages of the exhibit purporting to show the signature of the defendant, Desimone (R. 191, 192) and Harold Hopkins (R. 193) was predicated upon identical grounds. At the conclusion of the trial, defendants renewed their motion to

strike Plaintiff's Exhibits 2, 4 and 5 as follows (R. 336, 337):

"I would like, also, for the sake of the record, to renew the defendants' motion to strike the following exhibits * * * Plaintiff's Exhibit 2 and each and every component sheet thereof, Plaintiff's Exhibit 4 and each and every component sheet thereof, and Plaintiff's Exhibit 5 and each and every component sheet thereof, each of said exhibits and the several component sheets of the exhibit bearing a signature of an individual defendant in this case, as to which signature and the making of the signature there has been no proof of the making thereof, no identification from any witness who has identified the signatures or the documents, and for the further ground and the further reason that Title 28 of the U. S. Code, §1733, does not permit the introduction of said exhibits."

With reference to Plaintiff's Exhibit 4, defendants moved to strike the same on the following grounds (R. 196):

"MR. TOULOUSE: I likewise move to strike Plaintiff's Exhibit 4, which appears to be a W-2 return for the year 1951, the first page thereof, having some typing on it and not signed by anyone. The date is not quite legible, but it appears to be January 31, 1952, on the ground that it is a self-serving declaration of somebody. There is no evidence to establish that any one of these defendants was connected with, made, or knew of the making or authorized the making of the first page, and so, therefore, it is absolutely incompetent."

With reference to the subsequent pages of Plaintiff's Exhibit 4, defendants objected as follows (R. 198, 199):

"* * * I object to that on the ground there is no

evidence in this record, particularly from the testimony of Mr Burdick himself to show other than the fact that one [187] year and a half ago he came to a certain office in the Internal Revenue Department and opened up a jacket known as the White Center Athletic Club jacket, under a certain number, and that he pulled this particular paper out of it. There is no showing that Mr. Stepich signed this or that any one of these defendants signed it. There is no showing that the White Center Athletic Club signed it or authorized any person to sign it on its behalf. Mr. Burdick specifically stated that he didn't know who sent it in, how it was received, who prepared it, or anything else in connection with it other than the fact that he had it, that it was in a jacket.

“Now, the same thing is true with respect to the next page * * *.

“It is item 4 in the exhibit, which apparently is a mimeographed form filled in with dates, reciting October 31, 1951, and saying ‘lack of funds at due date. John F. Stepich, Pres.’ He doesn't say he is president of what. It doesn't show that this John F. Stepich in this courtroom signed this exhibit or that he had authority to sign it on behalf of any corporation known as the White Center Athletic Club, Inc., [188] or that he had authority from any one of the defendants, that is Felton, DePierris, Desimone or Hopkins, to sign it, or that he had authority from any officer, director or stockholder of the Athletic Club.”

The motion to strike was renewed at the conclusion of the trial (R. 336, quoted *supra*).

With reference to Plaintiff's Exhibit 5, appellants

at the conclusion of the government's case moved to strike the same (R. 206, 207) :

“MR. TOULOUSE: Yes, your Honor. The defendants move that Plaintiff's Exhibit 5 be stricken on the ground that it is incompetent * * * .

“ * * * There is no showing in the evidence that Mr. Desimone made this return, signed this [198] return, or that any of the defendants DePierris, Felton, Stepich or Hopkins authorized him to sign the return, that it was done with their knowledge, with their permission, or in their presence, or that it was done by the White Center Athletic Club, or that Mr. Desimone had any connection with the White Center Athletic Club as an officer, director, or stockholder, or that this signature appearing thereon is that of the Mr. Desimone who is a defendant in this case, or that this document was transmitted—first, who was it prepared by? There is no evidence as to who prepared it. Secondly, there is no evidence who sent it. Thirdly, there is no evidence who signed it. Fourthly, there is no evidence who put it in the jacket. Fifthly, it is only evidence, if at all, of the fact that the Government had in its jacket three pieces of paper marked Plaintiff's Exhibit 5.”

At the conclusion of the trial, this motion was renewed (R. 336, quoted *supra*).

3. The trial court erred in failing to grant defendants' motion to dismiss the indictment and in failing to grant defendants' motion for acquittal on the ground that the evidence failed to prove the crime charged (R. 222, 337).

4. The trial court committed error by entering Special Findings of Fact I (R. 20) because that purported

Special Findings of Fact states a conclusion of law and is not a finding of fact. The trial court further erred in failing to make a Special Finding of Fact establishing an agreement between any of the defendants to violate Title 26, Section 1753, U.S.C., and in failing to find specially who the original parties to such an agreement were, which of the defendants entered into the original agreement and on which approximate date any of the defendants joined the conspiracy, subsequently. The trial court erred in failing to comply with defendants' request for Special Findings of Fact (R. 14-19).

5. The trial court erred in entering Special Findings of Fact III (1), (2), (3), and (4), and in entering Special Findings of Fact IV (1), (2), (5) and (11) (R. 20-25) on the ground that said findings of purported overt acts are not substantiated by the evidence.

ARGUMENT

Point 1. The evidence does not prove beyond a reasonable doubt that the Defendants agreed to violate Title 26, Section 3253, U.S.C. and there is no evidence of a specific design, plan or purpose on the part of the Defendants to violate Section 3253.

It is clear that a conspiracy necessitates the existence of an agreement with a single design for the accomplishment of a common purpose and the joinder of the accused to further the purpose of the agreement.

The evidence previously outlined in this case, appellants submit, might be sufficient to establish the existence of a conspiracy between some of the defendants to violate the Washington State Liquor Act. Appellants are convinced that the testimony is insufficient to show

the existence of an agreement between the defendants to fail to pay *the \$50.00 federal occupation tax* required by Title 26, Section 3253, U.S.C., for the period covered by the indictment.

Appellants challenge the respondent to show to this court by as much as a scintilla of evidence that the defendants, Hopkins and Stepich, had any knowledge of the existence of such a tax. The record shows that these defendants are businessmen engaged in the fish and insurance business, respectively (R. 236, 241, 243, 294, 296); that their reputation in the community is excellent (R. 236, 238, 239, 241, 243, 298, 333); and that they are generally well liked and highly regarded (R. 357, 359). The witness Charlotte Fulford during the period covered by the indictment was merely hired as office girl, checkroom girl, and cashier to provide coins for patrons of the slot machines belonging to the club. Appellants submit that it is contrary to common experience to infer that the defendant, Desimone, who, according to the undisputed testimony of all the witnesses, owned, managed and operated the White Center Athletic Club (R. 260, 285, 302, 306, 317), would make an agreement with these men and the office girl, who was paid \$8.00 per day, not to pay a \$50.00 yearly occupation tax.

The defendants, Felton and DePierris, were employed as bartenders at \$15.00 per day. Not only is there no evidence in the record to show the existence of an agreement between them and the other defendants to fail to pay the occupation tax, but the government's witnesses definitely stated that neither of these defendants

was aware of the federal requirement. Thus, one government's witness testified that when the premises were raided during October, 1951, he asked the defendant, Felton, about the Federal Liquor Dealer's License (R. 125):

"Q. Did you ask him anything else?

A. I asked him to see the Federal retail liquor dealer's tax stamp.

Q. And what, if anything, did he say then?

A. *He did not know if they had one or, if so, where it was.*"

The government's witness testified that during the raid of January 18, 1952, when asking the defendant, DePierris, about this matter, he received the following response (R. 129, 130):

"Q. What, if anything, did you say to Mr. DePierris at this time and what did he say to you?

A. I inquired to see the retail liquor dealer's Federal tax stamp for the premises.

Q. What did he say, if anything?

A. He didn't know about the stamp, *in fact, didn't know what such document was, and I proceeded to explain to him that it was a Federal tax for selling liquor.* He again told me he wasn't selling liquor; he was only serving liquor for a service charge."

Another government's witness testified as follows (R. 146):

"MR. HARRIS: Mr. DePierris.

A. I questioned him regarding an RLD stamp, a retail liquor dealer's stamp, at the club. At his instance, *I explained to him what it was.*

Q. In so many words, what did you say?

A. I told him it was required by the Federal Government for persons who sell liquor at retail.

Q. What did he say? [124]

A. He was noncommittal. *He seemed ignorant of the law.*"

The record shows that the two bartenders previous to their employment by the club had not engaged in selling liquor by the drink (R. 254, 284) and for this reason their ignorance concerning the necessity of a Federal Retail Liquor Stamp is perfectly natural. The evidence submitted renders it even questionable whether the defendant, Desimone, knew that his operation was subject to a federal tax. The government's witness testified as follows (R. 133, 134) :

"A. He inquired of Mr. Desimone to see the retail liquor dealer's Federal tax stamp for the premises.

Q. And what did he say, if anything?

A. *That they didn't need one because they weren't selling whiskey; they were just selling service.* * * *

Q. Did you have any further conversation with Mr. Desimone at that time?

A. Yes. We talked about the tax stamp at some length, and I made the rather broad comment to Mr. Desimone that he had been in the game a long time; he should know better than to operate a liquor place without a tax stamp; that he was flirting with the penalty to McNeill Island, and it was more of a joke than anything else, and we laughed it off as such."

It is submitted that it is contrary to common sense to assume that the defendant, Desimone, would want to be

sent to McNeill Island when he could obviate that possibility by merely paying a \$50.00 tax. The inherent improbability of knowledge on the part of the defendant, Desimone, likewise is confirmed by the existence of Plaintiff's Exhibits 2, 4 and 5 showing that the White Center Athletic Club filed both state and federal returns necessitating far greater tax payments than the \$50.00 involved here.

Lest it be argued by respondent that the defendant, Desimone, must have been perfectly aware of the fact that bottle clubs were illegal in the state of Washington, this court should take judicial notice of the fact that the legal status of such clubs during the period covered by the indictment was in litigation. The legality of the existence of such clubs and the fact that they did not need to be licensed by the State Liquor Board was ultimately established by the decision in the case *Derby Club, et al., v. Becket*, 41 Wn.(2d) 869, 252 P. (2d) 259. The White Center Athletic Club was a party to that action which was brought to enjoin the Washington State Liquor Board from arresting bottle club operators. The decision shows that the bottle clubs were fortified in taking the position that they did not need a license by an opinion of the attorney general of the State of Washington which held that subsequent to the passage of Initiative 171 in 1948 bottle clubs were legal.

An agreement to violate Title 26, Section 3253, U.S.C., apparently was predicated by the trial court upon a mere inference from the fact that the defendants, Desimone, Felton and DePierris, sold liquor by

the drink illegally. Although there is absolutely no evidence in the record proving that the defendants, De-Pierris and Felton, or the witness, Charlotte Fulford, had any knowledge of the existence of the federal tax and although it is doubtful whether the defendant, Desimone, was aware of its existence, appellants take the position that mere knowledge of the existence of the tax as a matter of law is insufficient to prove an agreement to violate the statute. In this connection the reasoning of the Circuit Court of Appeals for the Eighth Circuit in the case of *Davidson, et al., v. United States*, 61 F.(2d) 250, reversing judgment of conviction as to certain defendants and affirming conviction as to others appears to be particularly cogent with reference to the case at hand (pp. 254, 255) :

“ * * * *Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy.* The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein, with knowledge of the agreement.

“*Presumption cannot be based upon another presumption but only upon facts.* It is not necessary that all of the alleged conspirators should have been such from the beginning of the conspiracy. There may be a subsequent joining; *but a person, to be held as subsequently joining a conspiracy, must be shown to have had knowledge of the conspiracy at the time of joining, and to have participated while having such knowledge.*”

The gist of the offense in the instant case, of course,

consists in a purported specific intent and agreement between the defendants not to pay the federal tax. What possible reason could there exist for an agreement between the defendant, Desimone, the owner, manager and operator of the club, and the two bartenders and the office girl? To pose the question, it is submitted to a reasonable mind immediately demonstrates the inherent absurdity of the inference of any agreement. If the defendant, Desimone, was aware of the tax and intended not to pay it, why would he need an agreement with the bartenders and his office girl to accomplish that purpose?

Assuming for the purpose of argument that Plaintiff's Exhibits 2, 4 and 5 are admissible and that the defendants, Stepich and Hopkins, were officers of the club during the period covered by the indictment, it must be pointed out that their connection with the club management is almost nil as has been previously related in appellants' statement of the case. With reference to the defendant, Hopkins, we have the single occasion of his arranging a dinner party for an orthopedic guild during January, 1951 (R. 109), and with reference to the defendant, Stepich, we have one occasion on May 6, 1952, when he permitted a witness to enter the club and supplied change for the slot machines. As far as the record shows, it is submitted that there is no evidence whatsoever that the defendant, Stepich, even knew of illegal sales of liquor in the club. With reference to the defendant, Hopkins, such knowledge of illegal sales might perhaps be inferred by some stretch of the imagination. We must remember, however, that knowledge of the illegal sale of liquor is not the gist of the offense with

which the defendants are charged. Even if it could be demonstrated from the evidence and we submit that there is not one iota of evidence in the record that the defendants, Hopkins and Stepich, were aware of the federal occupation tax and were aware of the fact that it had not been paid, such knowledge alone would be insufficient to prove the crime charged.

Thus, in the case of *United States v. Falcone, et al.*, 109 F.(2d) 579 affd., 311 US. 205, where a conviction of sellers who supplied vast quantities of sugar, yeast and cans to illicit distillers of alcohol was reversed, Judge Learned Hand, generally regarded by bench and bar as one of the truly great and outstanding American jurists, reasoned (p. 581):

“ * * * but in prosecutions for conspiracy or abetting, *his attitude towards the forbidden undertaking must be more positive.* It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; *he must in some sense promote their venture himself, make it his own, have a stake in its outcome.* The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. *That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.* We may agree that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do so was *toto coelo* different from joining with them in running the stills * * *.”

Again, in the case of *United States v. Di Re*, 159 F. (2d) 818, where the government sought to justify an arrest on the basis of the arresting officer having reasonable cause to believe a passenger in an automobile to be guilty of conspiracy to possess counterfeit gas ration coupons in the possession of other occupants of the car, the Honorable Learned Hand writing the majority opinion explained (819):

“ * * * We have several times had occasion to consider what relation to a conspiracy makes a man a confederate, and what relation to the principals in a crime makes a man an abettor; and we have uniformly held that the prosecution must prove the accused to have associated himself with the principals *in the sense that he has a stake in the success of the venture*. When the Supreme Court affirmed us in *United States v. Falcone*, it held that the sale of material to those who the seller knows will use it to commit a crime, does not make the seller a party to a conspiracy of the buyers. We do not understand *that the decision turned upon the fact that the seller might not have been aware that there were several buyers acting in concert*; and, so far as we can see, our doctrine is a corollary of the decision, although the opinion did not expressly go so far. * * * ”

Clearly, the economic interest of the defendants, Felton and DePieris, merely earning wages as bartenders, and the economic interest of the witness, Charlotte Fulford, being paid wages of \$8.00 a day, is far less than the economic interest of the sellers of sugar, yeast and cans for illicit distilling purposes in the *Falcone* case, *supra*. The bartenders and the office girl, of course, had no interest whatever in the defendant Desimone's fail-

ure to pay the \$50.00 federal occupation tax. As to the defendants, Hopkins and Stepich, there is no evidence whatsoever in the record that they had any economic interest in the White Center Athletic Club or benefited from its operation. On this point, the testimony of the probation officer elicited at the time of sentencing at the request of the trial judge deserves to be noted (R. 353) :

“THE COURT: Now, as to the other defendants, did any of them make any money out of this transaction ?

MR. STEWART: No, your Honor. *The only two that made any money out of the transactions were the two bartenders who made their salary.’*”

Finally, the concluding statement made at the time of sentencing by the United States Assistant District Attorney who tried this case proves appellants’ contention (R. 347, 348) :

“MR. HARRIS: Your Honor, I am assuming that we all have a recollection of what transpired at the trial. I would like only to add to that very briefly that from the investigation conducted by the Federal Alcohol Tax unit, which in part was an investigation coupled with the State of Washington Tax Department and Alcohol Tax Department, that the investigation disclosed that *Peter Desimone was the primary and motivating factor in this whole matter; that he was the core, the brain; and that the whole set up all originated and commenced with his undertaking, and with his discontinuance of the matter the whole thing then came to an end; but that he was the primary and motivating factor; that the defendants Stepich and Hopkins had knowledge of what was going on but [4] did not in any way in any degree measure up with what Peter*

Desimone himself actually did. *We believe that he reaped all the profit or most of the profit that was able to be made out there.* That the two defendants, Felton and DePierris, *while they knew what was going on, were in no way, other than their salary and tips, if any, benefitted by this operation.* Their activity in the conspiracy was more or less controlled—or their active participation in it when they were allowed to participate was controlled by Peter Desimone.”

The knowledge imputed in the statement quoted to the defendants, Stepich and Hopkins, and the defendants, DePierris and Felton, is at most mere knowledge of illegal sales of liquor by the drink, but there is no evidence whatsoever to prove that at the beginning of the operation in July, 1951, any of them knew of the existence of the federal tax. Nor is there any evidence that they knew that such tax had not been paid. Of course, both bartenders had no connection whatsoever with the club at the commencement of the operation and it is therefore clear that they could not have been the original conspirators. Under the admissible evidence, there are no facts tending to prove that the defendants, Stepich and Hopkins, were connected in any manner with the club at the commencement of the operation. Hence, they could not have been original conspirators. That would leave only the possibility of a conspiracy between the defendant, Desimone, and the witness, Charlotte Fulford, and we have already demonstrated the inherent absurdity of inferring an agreement between her and the defendant, Desimone, to fail to pay the occupation tax. Hence, it is submitted that under the evidence before the trial court the existence

of the necessary agreement rests entirely upon conjecture, surmise, inference pyramided upon inference, and guess without substance in fact, experience or logic. Loose as the rules of evidence may be in the law of conspiracy, it is respectfully submitted that the facts before the court in this case do not rise to the dignity required to establish the crime of conspiracy.

Point 2. The special findings of fact entered by the trial court do not support the judgment and sentence. There is no finding of an existing agreement between any of the alleged conspirators. There is no finding as to when the conspiracy originated nor as to who the original parties to it were. There is no finding when the other Defendants joined the conspiracy nor is there any finding of the existence of the conspiracy to be joined. The trial court erred in failing to make the special findings requested by the Defendants in accordance with Rule 23 (c) of Federal Rules of Criminal Procedure.

Rule 23 (c) of the Federal Rules of Criminal Procedure makes it mandatory upon the trial judge to make a general finding and on request to make special findings (18 U.S.C. Federal Rules of Criminal Procedure 23 (c)):

“ * * * In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.”

Appellants in compliance with the rule submitted a request for special findings of fact (R 14-15) and submitted proposed special findings of fact (R. 16-19). The trial court made the following special finding of fact (R. 20):

“That during the period commencing June 30, 1951, and ending May 8, 1952, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris did unlawfully conspire to and with one another, and with divers other persons (to-wit, Charolette Fulford) to commit an offense against the United States, to-wit, to wilfully and unlawfully carry on the business of a retail liquor dealer, and in so doing to wilfully fail to pay the tax required by law, contrary to the provisions of Title 26, U.S.C., Sec. 3253.”

It is submitted that the finding quoted, states a conclusion of law rather than a finding of fact. This is the only finding relating to the gist of the crime, *i.e.*, “conspiracy.” The gist of that crime consists in an agreement to violate a law which must be made at least between two persons and must originate at some time. Patently, there is no finding in this case as to any of these elements. Of course, the failure to make a proper finding must be explained on the basis of the lack of existence of evidentiary facts to support such a necessary finding.

As appears from the commentary of the advisory committee helping in the preparation of the Federal Rules of Criminal Procedure, the requirement of findings in cases tried to the court was adopted from Connecticut practice (see Federal Rules of Criminal Procedure for the District Courts of the United States, West Publishing Co. 1946, pp. 33-37). The rule was de-

signed to follow the practice outlined in the case of *State v. Frost*, 105 Conn. 326, 135 Atl. 446, 448-449:

“ * * * In the criminal case tried to the court, it makes a finding of the facts upon which its conclusions are reached. *Its finding should contain the subordinate facts found and then the conclusions reached from those subordinate facts. The method thus far conforms with that of the civil case tried to the court.* * * * ”

“It is essential that the conclusions reached by the court should be stated in the finding. *If these be conclusions of fact based upon the subordinate facts, these should be stated.* If these be conclusions of law reached by the court of its own motion, or in passing upon claims of law made by either party, these should be stated. *A conclusion in the finding that the accused had been proved guilty, as charged, beyond a reasonable doubt, could only be tested on appeal by determining whether the subordinate facts fairly supported this conclusion.* * * * ”

It is submitted that the trial court should have entered the defendants' proposed special findings (R. 16-19). They show insufficiency of the evidence to prove existence of an agreement to violate the statute involved, insufficiency of the evidence to prove who the original conspirators were, insufficiency of the evidence to prove who of the defendants joined later and at what time, and insufficiency of the evidence that the alleged overt acts were the result of any of the defendants acting in concert.

In the absence of a special finding of necessary subordinate facts, *i.e.*, the existence of an agreement to violate the federal occupational tax statute, the judgment

and sentence of conviction should not be allowed to stand.

Appellants also urge that as to the overt acts found in Finding No. III (1), (2), (3) and (4), and Finding No. IV (1), (2), (5), and (11) (R.21-25), there exists no evidence. Appellants do not wish to belabor this point by reason of the fact that if a conspiracy had been found a single overt act would suffice for conviction.

Point 3. Plaintiff's Exhibits 2, 4 and 5 should not have been admitted because no proper foundation was laid for their admission. The failure of proof showing that the signatures affixed to the documents admitted were those of the Defendants named rendered the exhibits incompetent. Their admission was particularly prejudicial to the Defendants, Stepich and Hopkins, in that these exhibits constitute the only link connecting these Defendants with the White Center Athletic Club at the period specified in the indictment as the date of origin of the conspiracy.

A. No proper foundation was laid for the admission of Exhibit 2 (application for certificate of registration and bi-monthly state excise tax returns filed with the Washington State Tax Commission). There is no evidence identifying the signature contained on the exhibit as being those of any of the appellants.

Plaintiff's Exhibit 2 was introduced not for its contents, but for the specific purpose to show the existence of a connection between the defendants, Desimone, Hopkins and Stepich, with the White Center Athletic Club, to-wit; that they were officers of the club (R. 63). The witness through whom this exhibit was

offered testified that he was the field agent of the Washington State Tax Commission charged with registering mechanical devices (R. 60). He admitted that he was not the custodian of the excise tax reports (R. 64, 65);

“THE WITNESS: Well, the excise tax returns forms are kept in a separate file, and the slot machine returns are kept in my office. *In other words, I have nothing to do with the excise tax return forms.*

MR. TOULOUSE: In other words, you had nothing to do with those returns right there as far as physical custody of those papers is concerned? You haven't had any custody from the time they were received?

THE WITNESS: *That is right.*”

With reference to the signatures on the exhibit he testified (R. 65, 68-69):

“MR. TOULOUSE: You don't know whose signature is on there, do you?

THE WITNESS: No.”

* * *

“Q. You don't know whether or not that is the signature of John Stepich on that application, do you?

A. That is correct.

Q. You do not know whether it is his signature?

A. *I do not.*”

* * *

“Q. So my statement is still correct, that you don't know whether or not that is Mr. Stepich's signature or whether or not that is Mr. Hopkins' signature, is that correct?

A. That is correct.”

This exhibit was admitted not against the White Center Athletic Club, but against third parties, the defendants, Desimone, Hopkins and Stepich. There is no proof that the offering witness was the custodian of these records. There is no proof that they were made by the club in the regular course of business, or that the persons who signed the exhibit were authorized to do so. It follows that this exhibit is not admissible pursuant to Title 28, U.S.C., Section 1732 or pursuant to Rule 44 of Federal Rules of Civil Procedure.

B. Plaintiff's Exhibits 4 and 5 should not have been admitted because the government failed to establish the identity of the purported signatures and failed to establish that the persons signing the exhibits had authority to execute the same.

These exhibits are employer's quarterly tax returns purported to be signed by Harold Hopkins and John F. Stepich, respectively (Plaintiff's Exhibit 4) and special tax returns for coin operated gaming devices purported to be signed by Peter Desimone (Plaintiff's Exhibit 5). The identity of the signatures was not proven and it was not shown that the purported signers had authority to execute the exhibits.

It is submitted that Plaintiff's Exhibits 4 and 5 are not admissible pursuant to Title 28, U.S.C., Section 1732 because they are not "a memorandum or record of any act, transaction, occurrence or event" within the ambit of said section. They are likewise not admissible pursuant to Title 28, U.S.C., Section 1733 as government records because as such they are neither material or relevant with reference to the issues before the court.

Nor, were these exhibits rendered admissible pursuant to Rule 44 of the Federal Rules of Civil Procedure. The government witness through whom the exhibits were offered frankly admitted that he did not know the signatures of the persons purported to have signed the exhibits (R. 85):

“ * * * Now, do you know that to be John Stepich’s signature?

A. I do not, sir.

Q. You do not?

A. I do not know that to be his actual signature.

Q. And as to the other signatures on the [48] several remaining component parts of Plaintiff’s Exhibit 4, do you know those to be the signatures of the parties whose names are there written?

A. I do not, sir.

Q. And is the same thing true with respect to the purported signatures of persons appearing in Plaintiff’s Exhibit 5?

A. *I do not, sir.*”

There is no testimony in the record proving that the signatures on the exhibits are those of any of the defendants. There is no independent testimony in the record showing that for the period from July 1, 1951, to March, 1952, the defendants named were officers of the White Center Athletic Club. On the contrary, the witness having checked for the government the corporate records of the club testified that for the years 1951 and 1952 he could find no corporate records of the club (R. 178, 179). It is submitted that Plaintiff’s Exhibits 4 and 5 are not competent nor are they material or relevant as far as their contents are concerned for the

purpose of the action. The observation made by the Eighth Circuit Court of Appeals in the case of *Masterson v. Pa. R. Co.*, 182 F.(2d) 793, is pertinent here (p. 797):

“ * * * Obviously a writing is not admissible under the Business Records Acts merely because it may appear upon its face to be a writing made by a physician in the regular course of his practice. It must first be shown that the writing was actually made by or under the direction of the physician at or near the time of his examination of the individual in question and also that it was his custom in the regular course of his professional practice to make such a record * * * .”

The rule recognized by the court in the case of *Levey, et al. v. United States*, 92 F.(2d) 688, demonstrates the inadmissibility of these exhibits (p. 691):

“Appellant also objected to the introduction in evidence of the records of Wilson-Fairbanks Company and Hachez & Company, and contends that they were inadmissible because they were records of third persons over which none of the defendants had any control. These records were not introduced to show admissions of appellants but to show the almost immediate sale of collateral. In *Wilkes v. United States* (C.C.A.) *supra*, 80 F.(2d) 285, 290, it is said: ‘*The general rule is that, before the books of a corporation can be received in evidence against a defendant other than the corporation itself, the entries herein must be shown to have been made by persons having knowledge of the facts, and must be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, insane, or beyond the reach of process.*’ ”

Likewise, the ruling of this court in the case of *Wolcher v. United States*, 200 F.(2d) 493, is applicable (p. 498):

“The court also admitted in evidence a paper or memorandum obtained by a Government special agent from Wolcher’s office files. The paper was dated February, 1936, and was a carbon copy of a purported note sent to the Seattle office of Wolcher’s business. It bore the initials ‘L. E. W.’ and ‘E. C.’ It contained language to the effect that the writer or writers ‘should like to receive a check from you very soon against our private account, so that we can show a similar profit in the coming year and perhaps make considerable more money.’ The paper was wholly without foundation; *there was no proof of its genuineness or who wrote it, or that it was a document made in the regular course of business, or otherwise.* Its receipt over appellant’s objection was error.”

The government having failed to prove the identity of the signatures, it is clear that Plaintiff’s Exhibits 2, 4 and 5 are inadmissible. That their admission constitutes prejudicial error is obvious. These exhibits constitute the only evidence in the record showing that the defendants, Desimone, Stepich and Hopkins, were officers of the club during the period the alleged conspiracy must have originated.

Point 4. The indictment is ambiguous and uncertain and not in the language of the statute defining the offense. It charges a non-existing crime and fails to charge properly the crime sought to be defined. For these reasons Defendants' motion to dismiss should have been granted.

The charging portion of the indictment reads (R. 3) :

“That during the period commencing June 30, 1951, and ending May 8, 1952, at Seattle, in the Northern Division of the Western District of Washington, Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert De-Pierris did unlawfully conspire to and with one another, and with divers other persons to the Grand Jury unknown, to commit an offense against the United States, to-wit, *to wilfully and unlawfully carry on the business of a retail liquor dealer, and in so doing to wilfully fail to pay the tax required by law, contrary to the provisions of Title 26, U.S.C., Section 3253; * * **”

The pertinent portion of Title 26, U.S.C., Section 3253 reads:

“Any person who shall carry on the business of * * * retail liquor dealer * * * and wilfully fails to pay the special tax as required by law, shall * * * be fined * * * and be imprisoned * * * .”

Clearly, the indictment charges the defendants with conspiracy of *wilfully and unlawfully carrying on the business of retail liquor dealer*. There is no such offense defined by Title 26, U.S.C., Section 3253, it is submitted. The only offense that exists is that of carrying on the business of retail liquor dealer AND wilfully failing to pay the tax. It follows that the information charges a nonexistent crime.

The words "and in so doing" used in the indictment render the indictment ambiguous. If the words relate to the language used immediately preceding them no offense is stated. If these words relate to the wilful failure to pay the tax the indictment must be interpreted as charging in effect a conspiracy to commit a conspiracy.

From the language of the indictment, the defendants could not be sure whether they are charged with a conspiracy to carry on an illegal business or with a conspiracy to wilfully fail to pay a tax. It is submitted that the indictment is uncertain and ambiguous rendering it impossible for the defendants to know against which charge they would have to defend themselves.

CONCLUSION

It having been shown that the evidence fails to prove an agreement between any of the defendants themselves, or any of the defendants and other persons, to wilfully pay the federal occupation tax, it having been shown that the special findings of fact are fatally defective, that the trial court admitted prejudicial incompetent evidence and that the indictment is uncertain and ambiguous and does not charge the crime of conspiracy to violate Title 26, U.S.C., Section 3253 properly, it is submitted that the judgment and sentence of conviction be vacated and the decision of the trial court be reversed.

Respectfully submitted,

MAX R. NICOLAI,
Attorney for Appellants.

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HAROLD HOPKINS,
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BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION

The appellee adopts the statement of jurisdiction set forth in the appellants' brief.

STATEMENT OF THE CASE

The statement of the facts set forth in appellants' brief is in general a fair resume of the record, but

in view of the fact that appellants' argument relates to the sufficiency of the evidence to support the judgment and sentence, the appellee deems it necessary to outline the evidence in more detail, and to view it in a light more favorable to the Government, the prevailing party in the lower court.

The evidence shows that a business was being operated at 9616 17th S. W., Seattle, Washington, and that this business used the name, "White Center Athletic Club, Inc., and operated as a retail liquor dealer without a Federal Retail Liquor Dealer's stamp tax, all during the period commencing on July 1, 1951 and ending May 8, 1952. It further shows that the names, Peter Desimone, John F. Stepich and Harold Hopkins, were connected with this business in July 1951, and continuously throughout the period alleged in the indictment. The co-defendant, Russell W. Felton (not an appellant) was in the business in July of 1951 (R. 247) while the co-defendant Bert DePierris (not an appellant) joined the business in December of 1951 (R. 277). The establishment sold liquor over the bar to anyone who could gain admittance (R. 168, 169, 87-92) and apparently the only requirement for admission was an ability to convince the door-man that you were not a law enforcement agent. A customer could also buy meals at the establishment as well as play the slot machines.

During the period in the indictment the premises were entered by State and local law enforcement officers on a dozen occasions, at least six of which were on the authority of county search warrants. The defendants Desimone, Felton, and DePierris all maintained to the officers that they were NOT selling liquor, BUT only selling service. This was refuted by the evidence throughout, and by the admission of the defendant Felton to the witness Turner (R. 141) and Felton's testimony (R. 266, 269).

Appellants' reference to the evidence on p. 4 of their brief relative to the lack of a Federal Retail Liquor Stamp is correct in its details, as well as the physical description of the premises.

Appellants then refer to each of the co-defendants and Charlotte Fulford, individually. The first person discussed is one of the appellants, Peter Desimone. The statement concerning him is correct as far as it goes (Appellants' Brief pp. 5 and 6) but it should be added that Desimone signed Exhibits 2 and 5 as manager, and/or Vice President of the White Center Athletic Club, Inc.; that he also admitted customers after interrogating them, and otherwise acted as manager of the establishment.

It should also be mentioned that the present counsel for the appellants, Max R. Nicolai, appeared as a

witness for appellee (R. 105-108), and that he did not represent any of the defendants in the trial court below, that all of the defendants were then represented by George J. Toulouse, Jr. and John Spiller, Attorneys at Law. The witness Nicolai testified that in March, 1952 he had been retained by Mr. Desimone to represent the White Center Athletic Club in some other litigation. Desimone admitted having a "house stock" of liquor (R. 132), and when asked to see his Federal Retail Liquor Dealer's tax stamp, he said he didn't need one because he wasn't selling whiskey, but just selling service (R. 133, 147). The seals on the liquor bottles were defaced (R. 148) so that the numerals weren't legible on the Federal strip stamp. Desimone obviously let Felton and DePierris "hold the bag" on the local state liquor violations. Furthermore, from all of the evidence it is obvious that Desimone and the other appellants had no intention of securing a Federal Retail Liquor Dealer's tax stamp for one reason only, that is, that the possession of such a stamp would make a prima facie case in the state courts that they were operating as a retail liquor dealer and not, as they would insist with tongue in cheek, that they were just selling service.

Desimone advised Felton and DePierris to stick to the story about selling service and not liquor. One of the employees, Fulford, took steps to cover

a situation involving an Orthopedic Guild dinner party when she handed a list of liquors to Mrs. Noble, (R. 115) and gave her instructions as to what to do if they had any trouble with the State Liquor Board men. In this particular situation arrangements had been made sometime earlier by appellant Hopkins with Dixie Schwier whereby liquor could be purchased by the drink (R. 110).

Appellants make reference to Charlotte Fulford, but as she was not a defendant, no further reference will be made to her, except as she may appear otherwise in the case.

The next reference is to appellant John Stepich, whose name appears on Exhibits 2 and 4 as President of the White Center Athletic Club, Inc. The incorporation papers also show him as President of the White Center Athletic Club, Inc. (R. 176, 178). On January 18, 1952 Stepich was on the premises (R. 145, 152); he was sitting at the bar after the inventory of the liquor that was seized by the state officers was made. The testimony shows that he acted as a doorman and interrogated the witness Daggett before allowing him admission onto the premises (R. 169, 182, 183, 184, 185) and that he had free access to the office, or cashier's cage, into which not even employees were allowed to enter (R. 170, 282); that Stepich was in that room

several times and the witness purchased dimes from him in order to play the slot machines (R. 170, 174, 175, 186). The testimony also shows that he was regular in his attendance, at least on every Monday night (R. 268). That he continued to attend the club after the search warrant of February 4, 1952 was executed (R. 126), even after the fact that the establishment was operating without a Federal Retail Liquor Dealer's tax stamp was made known to the manager, Desimone. That Stepich's name was used after that on various tax reports, and the signatures appear the same, that he acted as doorman and interrogated the witness, Daggett, on May 6, 1952, before allowing him on the premises.

The remaining appellant to whom reference is made is Harold Hopkins, whose name appears on Exhibits 1, 2, and 4, as Secretary-Treasurer of the White Center Athletic Club, Inc. During January of 1952, the witness Schwier made arrangements with Hopkins at the White Center Athletic Club, to hold a dinner dance there, which included dinner and drinks (R. 110), and that drinks could be purchased at the establishment. On February 4, 1952, Hopkins was tending the door (R. 130, 131, 155) and that Hopkins was present when Desimone was questioned by the state officers concerning the Retail Dealer's Federal tax stamp (R. 133). On that occasion Hopkins also mentioned that

the liquor belonged to the club having a stag party there that night (R. 135) even though some of that liquor was referred to as "house stock" (p. 287). On March 29, 1952, in cause No. 441309 in the Superior Court for the State of Washington, County of King, entitled *State ex rel Chas. O. Carroll, Prosecuting Attorney of King County, Relator, vs. White Center Athletic Club*, a corporation, et al, defendants, the appellant in this case, Harold Hopkins signed under oath, sworn to before the now attorney for the appellants, that he, Hopkins, was secretary-treasurer of the White Center Athletic Club.

No additional reference will be made to the defendants Russell W. Felton and Bert DePierris except as they might appear in connection with the others, as they are not appellants in this cause.

SUMMARY OF ARGUMENT

The appellants were tried and convicted in the district court upon the charge of conspiring to violate the provisions of Title 26, U.S.C., Section 3253, rendering it illegal to carry on the business of a retail liquor dealer and in so doing to wilfully fail to pay a special tax required by law. The appellee asserts that no material errors of law occurred during the trial of the action and that the evidence adduced in support of this charge established beyond a reasonable

doubt the existence of a conspiracy by, between and among these appellants.

ARGUMENT

1. ANSWERING POINT I OF APPELLANTS' ARGUMENT, page 17 of their brief the appellee asserts that there is an overwhelming amount of evidence to support the court's findings and respectfully submits that a review of the entire record conclusively establishes the knowledge, intent and co-participation of these appellants in the conspiracy. Appellee's views in this regard were shared by the trial judge, an eminent jurist with over twenty years' experience on the trial bench, who had the opportunity of viewing and evaluating, first hand, the testimony of all of the witnesses in the case.

On at least six different occasions during the period alleged in the indictment when investigators for the Washington State Liquor Control Board examined the club premises pursuant to search warrants, demand was made upon one or more of the defendants to exhibit the Club's Federal retail liquor dealer's tax stamp.

On October 26, 1951, pursuant to a search warrant, the club premises were investigated by law enforcement officers and large quantities of spirituous

liquors were confiscated (R. 122, 123) and at that time demand was made upon defendant Felton for the Federal retail liquor dealer's tax stamp. It should be noted that in each instance where the evidence shows that bottles of spirituous liquor were confiscated, the witnesses testified that the Federal strip seal over the head of the individual bottles had been defaced so that an identification of the chronological numbering system of the bottles was impossible (R. 148).

On January 18, 1952, the premises were again raided by law enforcement agents pursuant to a search warrant and demand was at that time made upon defendant DePierris for the Club's Federal retail liquor dealer's tax stamp (R. 129). The evidence further shows that appellant John Stepich was on the premises at the time and was interrogated by the officers (R. 145, 152).

It is noted that between the last two dates mentioned, appellant Hopkins, acting in a managerial capacity for the Club, made arrangements for an Orthopedic Guild dinner and specifically made arrangements for those in attendance at the dinner to purchase liquor by the drink from the Club (R. 110).

Again on February 4, 1952, pursuant to a search warrant, officers entered the Club premises at which

time defendants Desimone, Hopkins, DePierris and Felton were present and at which time demand was made to see the Club's Federal retail liquor dealer's tax stamp (R. 130-135, 147, 155).

Again on March 1, 1952, pursuant to a search warrant, officers entered the premises at which time defendants DePierris and Felton were present, and demand was made to exhibit the Federal tax stamp. It is noted that in each of these instances where officers made demand for the tax stamp, the defendants and all of them stated that they did not need such stamps, that they were selling service, not liquor. (R. 135-137).

Officers conducted another raid on March 12, 1952, at which time defendant DePierris was asked about a Federal tax stamp (R. 139). Again on April 6, 1952 (R. 141) officers entered the Club premises pursuant to a search warrant and at that time made demand upon defendant Felton for the retail liquor dealer's tax stamp. It is noted that the defendant Felton finally admitted that he had been employed by the White Center Athletic Club, as a bartender and that he did sell liquor by the drink in violation of the Washington State Liquor Act (R. 259).

The appellee submits that it is fundamental law that knowledge to an agent conveyed in the ordinary course of business is knowledge to the principal and

that one partner is charged with knowledge conveyed to another partner in matters relating to the partnership business.

Revised Code of Wash., Sec. 25.04.120

PARTNERSHIP CHARGED WITH KNOWLEDGE OR NOTICE TO PARTNER.

"Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonable could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner."

It is further submitted that a criminal conspiracy need not be proven by direct evidence, but may be inferred from a collection of circumstances. *Glasser v. United States*, 315 U.S. 60, 80. The agreements involved in conspiracies are usually made secretly and ordinarily cannot be proven other than by circumstantial evidence. *Jianole v. United States*, 299 Fed. 496, 498; *Ryan v. United States*, 99 F. (2d) 864, 869, cert. den. 306 U.S. 635. In this regard, evidence showing a concert of action in the commission of unlawful acts from which a natural inference arises that the unlawful overt acts were in furtherance of a common design may be sufficient to show an unlawful agreement. *United States v. Holt*, 108 F. (2d)

365, 368, cert. den. 309 U.S. 672; *Windsor v. United States*, 286 Fed. 51, 53, cert. den. 262 U.S. 748.

In their brief the appellants refer to and rely heavily upon the case of *United States v. Falcone, et al*, 109 F. (2d) 579 affd., 311, U.S. 205. The appellee submits that the facts of that case are substantially different from the facts in the instant matter in that a sugar producer necessarily deals with many and varied users of sugar products, whereas one who deals in the retail liquor business has only one type of customer.

The appellants make some issue of the fact that the cost of the tax stamp involved is only \$50.00. However, as has been indicated herein before, the evidence is conclusive that while these appellants and all of the defendants knew that the White Center Athletic Club should have a Federal tax stamp, they also knew that the possession of such a stamp would make a prima facie case in a state court that they were operating as a retail liquor dealer, contrary to the Washington State Liquor Act.

Considering this view of the evidence, appellee submits that a conspiracy of this type can be described as a "partnership in crime". (*United States v. Socony-Vacuum Co.*, 310 U.S. 150, 253) and that a formal agreement is not necessary, but that it is sufficient

that the minds of the parties met understandingly so as to bring about an independent and deliberate agreement or even a mutual implied understanding. *Marx v. United States*, 86 F. (2d) 245, 250; *Hyde v. United States*, 225 U.S. 347, 376.

II. ANSWERING POINT II OF THE APPELLANTS' ARGUMENT found on page 28 of their brief, it is submitted that the trial court entered General and Special Findings of Fact pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure and that said General and Special Findings of Fact support the Judgment of conviction.

It is noted that pursuant to the above cited Rule, the Court, in cases tried without a jury, is directed to make general findings of fact, and, if requested, special findings of fact. In the instant case, the Court, pursuant to the defendants' request, did find the facts specially. However, it is respectfully submitted that it would be novel rule of law that would require a Court to enter findings of fact contrary to the expressed conviction of the trier of the facts. The trial court, therefore, was justified in not accepting the special findings of fact proposed by the defendants.

The appellee submits that Special Finding of Fact I (R 20) is a statement of the ultimate facts to be found in the case concerning the element of conspiracy between and among the defendants and is in com-

plete and full compliance with Rule 23(c), Federal Rules of Criminal Procedure.

The Appellee urges that there is overwhelming evidence, as noted in the appellee's Statement of Fact, herein, as to the overt acts found in Finding No. III (1), (2), (3) and (4), and Finding No. IV (1), (2), (5) and (11), (R. 21-25).

III. IN ANSWER TO POINT 3 OF APPELLANTS' ARGUMENT found on page 31 of their brief, appellee submits that the trial court properly admitted plaintiff's exhibits 2, 4 and 5 after having received other competent evidence and testimony bearing on the question of conspiracy between and among the defendants and that these exhibits are proper evidence of the case to be considered with the other evidence for whatever weight they may lend to prove the conspiracy charge. The appellee further submits, particularly with respect to plaintiff's exhibits 4 and 5, that Section 3809, Title 26, U.S.C., appears to be determinative of the question of admissibility of these exhibits. The pertinent portion thereof reads as follows:

“(b) *Signature Presumed Correct.* The fact that an individual's name is signed to a return, statement or other document filed shall be prima facie evidence for all purposes that the return, statement or other document was actually signed by him.”

It is further noted that the written signatures of each and all of the defendants appear on the Stipulation Waiving Trial by Jury (R. 10) and that insofar as these exhibits bear the identical names of the various defendants, the name of the White Center Athletic Club, Inc. and dates material to the times alleged in the indictment herein, these exhibits are admissible for whatever weight the trier of the facts may lend to them.

Sec. 1731, Title 28, U.S.C.:

"Handwriting. The admitted or approved handwriting of any person shall be permissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

IV. UNDER POINT 4 OF APPELLANTS' ARGUMENT, page 37 of their brief, it is urged that the defendants' motion to dismiss the indictment should have been granted.

The appellee submits that this motion was untimely and should have been presented and argued at the time of the hearing on the defendants' Motion to Strike and to Dismiss the Indictment (R. 8).

The appellee further submits that Sec. 3253, Title 28, U.S.C., the pertinent portion of which is cited in appellants' brief at page 37, defines one and only one crime. However, the statute clearly defines two spe-

cific elements which constitute the crime. They are, in substance, (1) to carry on the business of a retail liquor dealer (and no other kind of business) and (2) while carrying on such business, to wilfully fail to pay the special tax as required by law. It would therefore appear obvious that the indictment must allege, as it does (R. 3), each of these elements and that it is entirely proper to preface the two allegations of fact with the words "wilfully and unlawfully".

CONCLUSION

The trial judge personally observed all of the witnesses, considered all of the circumstances and facts of the case and found, beyond a reasonable doubt, that the defendants, including these appellants, were guilty of the conspiracy charged in the indictment. It appearing that no material errors of law occurred during the trial of the action, it is respectfully submitted that the judgment and sentence of conviction be confirmed.

Respectfully submitted,

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